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No. .....

In the Supreme Court
OF THE
United States

October Term, 1984

LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE CITY OF LOS ANGELES; and HARRY HANDLER, SUPERINTENDENT, In His Official Capacity,
Petitioners,

vs.

LOS ANGELES NAACP,
BEVERLY HILLS-HOLLYWOOD BRANCH NAACP,
SAN PEDRO-WILMINGTON BRANCH NAACP,
WATTS BRANCH NAACP, SAN FERNANDO VALLEY NAACP,
and CARSON NAACP,
Respondents.

**On Writ of Certiorari to the United States Court of Appeals,
Ninth Judicial Circuit, No. CA-81-5772**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the en banc opinion of the Court of Appeals, Ninth Circuit, which permits an identical class of black students to relitigate in federal court claims of de jure segregation for the period 1969-1981, after the same class had asserted de jure claims for that period in the state court, contravene the decisions of this Court in *Allen v. McCurry*, 449 U.S. 90 (1980), *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), and *Migra v. Warren City School District Board of Education*, ___ U.S. ____, 104 S.Ct. 892 (1984)?

2. Should a federal standard of claim preclusion be applied to prohibit the relitigation in federal court of de jure segregation claims litigated in a prior state action?

LIST OF PARTIES

Petitioners:

Los Angeles Unified School District; Board of Education of the City of Los Angeles; and Harry Handler, Superintendent, In His Official Capacity ("the District")

Respondents:

Los Angeles NAACP, Beverly Hills-Hollywood Branch NAACP, San Pedro-Wilmington Branch NAACP, Watts Branch NAACP, San Fernando Valley NAACP, and Carson NAACP ("the NAACP plaintiffs")

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The en banc opinions of the Court of Appeals filed December 21, 1984, as modified February 21, 1985, 750 F.2d 731, are in the Appendix.

A copy of the February 21, 1985, en banc order of the Court of Appeals for the Ninth Circuit, modifying in part the majority opinion and denying both a rehearing and the suggestion for a hearing by the entire court also is in the Appendix.

Other reported decisions relating to the case at bar are:

Crawford v. Board of Education, 458 U.S. 527 (1982) (*Crawford III*); *Board of Education of Los Angeles v. Superior Court,* 448 U.S. 1343 (1980) (opinion in chambers); *Bustop, Inc. v. Board of Education of the City of Los Angeles,* 439 U.S. 1380 and 1384 (1978) (opinions in chambers); *Los Angeles Unified School District v. Los Angeles Branch NAACP,* 714 F.2d 935 (9th Cir. 1983); *Los Angeles Branch NAACP v. Los Angeles Unified School District,* 714 F.2d 946 (9th Cir. 1983), *cert. denied sub nom. California State Dept. of Education v. Los Angeles Branch NAACP,* ____ U.S. ____, 104 S.Ct. 2398 (1984); *Los Angeles Unified School District v. U.S. District Court for Central District of California,* 650 F.2d 1004 (9th Cir. 1981); *Los Angeles NAACP v. Los Angeles Unified School District,* 518 F.Supp. 1053 (C.D. Cal. 1981); *Los Angeles NAACP v. Los Angeles Unified School District,* 513 F.Supp. 717 (C.D. Cal. 1981); *Crawford v. Board of Education of the City of Los Angeles,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976) (*Crawford I*); *Crawford v. Board of Education of the City of Los Angeles,* 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) (*Crawford II*).

JURISDICTION

The issues raised by this petition originated with the denial by the District Court, Central District of California, on July 16, 1981, of the District's motion for summary judgment. The district court on August 12, 1981, certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which was accepted by the Court of

Appeals, Ninth Circuit, by order dated September 14, 1981.[1]

Jurisdiction in the district court was invoked under the first, ninth, thirteenth and fourteenth amendments to the United States Constitution; 42 U.S.C. §§ 1981, 1983, 1988 and 2000d; 28 U.S.C. §§ 1331, 1343(3) and (4); and 20 U.S.C. §§ 2201 and 2202. Appendix at pp. 124a-125a.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the Court of Appeals, Ninth Circuit, which became final February 21, 1985. This petition is timely filed pursuant to the order of Justice William H. Rehnquist dated May 13, 1985, which extended the time for filing a petition for certiorari through July 3, 1985.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1738:

> "The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof,

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[1]Although the case at bar arises from an interlocutory order of the district court, it is not the type of an interlocutory ruling which presents only a preliminary issue (e.g., a motion to quash or change of venue). By the remand of the court below, the plaintiff class would be permitted to call the same witnesses, offer the same exhibits, consume endless days of litigation, resort to similar special writs — to repeat what occurred in the California state courts from 1969 through 1981. Once again the 565,000 students in the District's schools, their parents and 30,000 teachers will have their educational process interrupted at a new expense of millions of dollars. This Court previously has accepted for review interlocutory orders which could produce such a burdensome result. It recently accepted for review an interlocutory order which raised the proper interpretation of 28 U.S.C. § 1738. *Marrese v. American Academy of Orthopaedic Surgeons*, ____ U.S. ____, 105 S.Ct. 1327 (1985).

shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

On April 15, 1981, six Los Angeles area chapters of the NAACP filed this desegregation action in federal court on behalf of all black students attending the District's schools. The complaint alleged violations of the equal protection clause of the fourteenth amendment to the United States Constitution. Plaintiffs simultaneously filed an application for temporary restraining order, seeking to enjoin the District from partially dismantling a mandatory desegregation plan. The District's black students, as part of the larger class composed of the District's minority students, had previously sought the same relief in the state court in *Crawford v. Board of Education* (*Crawford*), asserting that the District's termination of that desegregation plan was an act of de jure segregation. However, the state court held that no de jure conduct was involved, and the state appellate courts declined review.

The district court issued a temporary restraining order which enjoined termination of the desegregation plan, 513 F.Supp. 717 (CD. Cal. 1981), but the court of appeals vacated that order following an emergency Saturday-afternoon hearing. 650 F.2d 1004 (9th Cir. 1981). The District then sought summary judgment, based on the still-pending *Crawford* case and the *Crawford* plaintiffs' continued reliance on both federal and state constitutional violations.

The district court denied the District's motion for summary judgment, 518 F.Supp. 1053 (C.D. Cal. 1981), but certified its ruling for interlocutory appeal, which was accepted by the court of appeals. After a panel of the court of appeals had held that plaintiffs in this action could not relitigate de jure claims which arose prior to the final judgment in *Crawford* entered September 10, 1981, 714 F.2d 935 (9th Cir. 1983), the court of appeals vacated the panel's decision, and ruled en banc that 28 U.S.C. § 1738 precluded the relitigation of federal constitutional claims that were made or could have been made before May 2, 1969, the last day of the liability trial in *Crawford.* 750 F.2d 731, 736 (9th Cir. 1985). The court's en banc opinion concludes that all of the criteria for claim preclusion have been established, that in ordinary circumstances claim preclusion would apply only to claims made before the filing of the *Crawford* complaint in 1963, but that a stipulation with respect to the issue of the District's bad faith acted as a supplemental complaint and extended the preclusive effect to May 2, 1969.

The specific issue presented by this application is whether the preclusive effect of the final judgment in *Crawford* shall apply as of the date of entry (September 10, 1981) or as of the much earlier date on which the liability hearing was completed (May 2, 1969). Since there is no question that all of the elements for claim

preclusion have been met for alleged fourteenth amendment violations occurring before May 2, 1969, this application will focus on events in the *Crawford* case which occurred between May 2, 1969, and September 10, 1981.

After the liability trial, the state trial court issued its findings of fact and conclusions of law and its writ of mandate, which determined that the District was guilty of acts of de jure segregation and which ordered the District to prepare a plan for the desegregation of its schools. The District appealed. In *Crawford v. Board of Education,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976) (*Crawford I*), the California Supreme Court modified and affirmed the trial court solely on the basis that school boards were under a state constitutional obligation to take reasonable and feasible steps to alleviate racial segregation in their schools, regardless of whether the segregation was de facto or de jure in nature. It then remanded the *Crawford* case to the trial court for the formulation and implementation of a reasonably feasible desegregation plan.

Following remand, the parties engaged in lengthy hearings to determine a remedy. In 1978, the District prepared, and, over the objection of the *Crawford* plaintiffs and intervenors, the court ordered implemented a plan identified as Plan 2, which called for large-scale mandatory pupil reassignment and transportation.

By the summer of 1979, all parties were dissatisfied with the results of Plan 2, and the District sought to have the court approve the withdrawal of that plan and the substitution of an entirely new plan based upon the voluntary transfer of students. In October 1979, the trial court began six months of hearings into the sufficiency of Plan 2 and the District's desire to substitute an all voluntary plan.

After approximately two weeks of hearings, on November 6, 1979, the voters of California approved Proposition 1,[2] a referendum which amended the equal protection clause of the California Constitution to prohibit state courts from ordering mandatory pupil reassignment and transportation except in circumstances where federal courts could impose those measures to remedy violations of the fourteenth amendment to the United States Constitution. On November 15, 1979, the District applied, pursuant to Proposition 1, to modify prior orders of the state trial court requiring mandatory reassignment and transportation of students.

During the five months of hearings that separated the District's application and the state trial court's denial of that application, the *Crawford* plaintiffs repeatedly sought to establish new federal constitutional violations. For example, the *Crawford* plaintiffs claimed that the District's construction of bungalows on overcrowded minority schools was an act of de jure segregation. Appendix at pp. 156a-229a.

The conduct to which these contentions were addressed occurred in 1976, 1977 and 1978, long after the cutoff date adopted by the decision below. As counsel for the *Crawford* plaintiffs told the state trial court in January 1980,

> "MR. DUFF: Your Honor, in all candor with the court, we have been, from the beginning of these proceedings, alleging that the Board has continued its pattern of de jure segregation.
>
> * * *
>
> "... We have been, from the beginning, stating objections to the plan with respect to the continuing existence of de jure conduct. This is one example of that." Appendix at pp. 214a-215a.

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[2]Appendix at pp. 154a-155a.

After its adoption, Proposition 1 was challenged by the *Crawford* plaintiffs as a de jure act and unconstitutional. The state trial court declined to apply Proposition 1, rejected the District's proposed desegregation plan and ordered implementation of a new plan which included increased reassignment and transportation of students. The District appealed and the California court of appeal reversed, holding that Proposition 1 was itself constitutional and precluded the imposition of a remedy that required mandatory transportation and reassignment of students. 115 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) (*Crawford II*). The court held that the facts found by the state trial court did not support that court's conclusion of de jure violations because they did not identify any intentional segregation. On March 11, 1981, the California supreme court denied the *Crawford* plaintiffs' petition for review. This Court granted their petition for certiorari on the issue of the constitutionality of Proposition 1, and affirmed. *Crawford v. Board of Education,* 458 U.S. 527 (1982) (*Crawford III*).[3]

Following remand to the state trial court, the *Crawford* plaintiffs alleged additional current violations by the District of the federal constitution, asserting that the District's decision to dismantle the court-ordered desegregation plan was an act of de jure segregation. After the state trial court denied their application for preliminary injunction on federal constitutional grounds (but before they had exhausted the appeal process), the six-named NAACP branches filed this action on behalf of the black student members of the *Crawford* class.

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[3]This Court traced in that opinion the history of both the *Crawford* state case and this case to the date of that opinion. See 458 U.S. at 529-34 and 534-5 n.10.

The state trial court conducted remedy proceedings during the spring and summer of 1981 in accordance with the *Crawford II* remittitur. On September 10, 1981, the court entered a final order approving a desegregation plan and terminating all jurisdiction over the case, except for its November 25, 1981, order disposing of the parties' attorneys' fees applications. Copies of these orders are included in the Appendix, pp. 245a-269a.

During 1969-1981 the *Crawford* litigation resulted in

26,351 pages of written testimony,
91 witnesses called,
564 documentary exhibits,
29 special writ proceedings taken, and
17 applications for state appellate review.

The cost to the District of all the foregoing proceedings and the court ordered desegregation plans was in excess of $910,000,000.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW IMPROPERLY CREATES AN EXCEPTION TO BOTH 28 U.S.C. § 1738 AND THE DECISIONS OF THIS COURT BY RESTRICTING THE FULL FAITH AND CREDIT THAT MUST BE ACCORDED TO THE CALIFORNIA STATE PROCEEDINGS IN THE *CRAWFORD* CASE.

A. The Decision Below Permits the Relitigation of De Jure Claims Arising During the Final Twelve Years of the *Crawford* Proceedings.

This Court repeatedly has expressed its view that it is essential to the relationship between federal and state courts to give full effect to 28 U.S.C. § 1738 unless

Congress has by other legislation clearly carved out an exception. Three recent cases, *Allen v. McCurry*, 449 U.S. 90 (1980), *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), and *Migra v. Warren City School District Board of Education*, ____ U.S. ____, 104 S.Ct. 892 (1984), held that, even in the sensitive field of civil rights, prior state court judgments should be given full recognition as a bar to federal actions based upon both litigated issues and claims that could have been litigated. This Court emphasized that the early adoption of this legislation was intended to give reassurance to the original states that the judgments of their courts would be recognized in the new federal judicial system. In *Kremer v. Chemical Construction Corp.*, Justice White wrote for the Court as follows:

> "As one of its first acts, Congress directed that all United States courts afford the same full-faith-and-credit to state court judgments that would apply in the state's own courts. Act of May 26, 1790, ch. 11, 1 Stats. 122, 28 U.S.C. § 1738 (1976)."

The en banc opinion below appears to concur fully with the views of this Court, and holds that

> "the present action is barred as to all matters that might have been litigated by the same parties in *Crawford.*"
>
> 750 F.2d at 738.

After holding that the *Crawford* plaintiffs and the plaintiffs in this action "are identical for purposes of res judicata" (750 F.2d at 744), the court below concludes that all de jure claims that were, or could have been, litigated during the liability phase of *Crawford* cannot be relitigated here.

> "The de jure issue was originally litigated; it could have been reopened at a later stage of the proceedings when the incentive to pursue it was greater.

> Plaintiffs cannot simply move to federal court and start anew. *See Allen v. McCurry*, 449 U.S. 90, 104-05, 101 S.Ct. 411, 420-21, 66 L.Ed.2d 308 (1980)."
>
> 750 F.2d at 745.

However, by barring only de jure claims arising before the conclusion of the liability phase in 1969, the decision below permits the relitigation of de jure claims that were actually litigated, and others that could have been litigated, between May 2, 1969, and September 10, 1981, when the state trial courts' final judgment was entered.[4] This result is contrary to the practical observation by the court below that

> ". . . unless subsequent generations of school children are bound by preclusion rules from relitigating identical claims of unlawful segregation, those claims would assume immortality."
>
> 750 F.2d at 741.

The opinion below recognizes that after the passage of Proposition 1 and particularly after the remittitur from *Crawford II,* which held that the 1970 findings of fact did not establish de jure segregation, the *Crawford* plaintiffs had a full and fair opportunity to litigate their post-1969 de jure claims. 750 F.2d at 742-746. In fact, on November 15, 1979, the District applied to have the state trial court

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[4]This determination is inconsistent with the Los Angeles federal district court's repeated refusal to entertain lawsuits alleging fourteenth amendment violations by the District in connection with its reassignment and transportation of students. The district court dismissed six such actions between 1978 and 1980. Appendix at pp. 270a-291a. In *Lopez v. Miller,* No. 79-3022 (1980), the court below affirmed the dismissal and held that federal constitutional claims arising out of the District's desegregation program were required to be resolved by the state court in *Crawford.*

hold a hearing pursuant to Proposition 1 to determine whether the District had committed acts of de jure segregation that would support the imposition of a mandatory pupil reassignment remedy. Thereafter, the *Crawford* plaintiffs notified the trial court that they might seek to present further evidence on de jure violations by the District, and the court below recognized that the *Crawford* plaintiffs had that opportunity:

> "We conclude, therefore, that the decision and remittitur in Crawford II did not foreclose further litigation of the issue of de jure segregation in the trial court. Plaintiffs here have not seriously contended otherwise."
>
> 750 F.2d at 744.

But, according to the opinion below, the *Crawford* plaintiffs never actually attempted to prove de jure conduct *to establish liability:*

> "If the *Crawford* plaintiffs had actually litigated the liability of the District for segregative acts occurring after May 2, 1969, then the res judicata bar would have to expand to encompass those events and others that might have been litigated with them. The record indicates, however, that the *Crawford* plaintiffs did not so open the litigation to later events."
>
> 750 F.2d at 740.

As we shall point out, that record reference is erroneous. The decision below permits plaintiffs to relitigate in this action de jure claims arising after May 2, 1969, despite a full and fair opportunity to litigate those claims in *Crawford* and an application by the District in November 1979

placing the existence of contemporaneous de jure claims in issue.[5]

The correct record is that the *Crawford* plaintiffs did litigate alleged acts of de jure segregation occurring after 1969. The decision below ambiguously deals with those efforts by ignoring some and characterizing others as relating to remedy rather than liability.

B. By Refusing To Recognize that the *Crawford* Plaintiffs Actually Litigated De Jure Segregation Claims Based on Conduct Occurring After 1969, the Decision Below Contravenes this Court's Established Decisions.

The decision below expressly recognizes that the *Crawford* "plaintiffs had vigorously and fully litigated the issue of whether Proposition 1 was itself an act of de jure segregation . . . [and] had vigorously litigated the question whether the Board's resolution of March 16, 1981, abandoning mandatory desegregation measures, was an act of de jure segregation." 750 F.2d at 745. Apparently, however, litigating these alleged acts of de jure segregation did not "open the litigation to later events," 750 F.2d at 740, because, according to the decision, the alleged de jure acts related to relief.

The decision below would undoubtedly similarly treat the *Crawford* plaintiffs' efforts during the 1980 remedy hearings to establish that the District was guilty of de jure conduct in placing bungalows on the campuses of

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[5]The District's application asked the court to hold a hearing to determine " '[w]hether this Court, *applying the facts as they exist today*, could properly determine that the Board had violated the Equal Protection Clause of the 14th Amendment.' " 750 F.2d at 747 (emphasis the court's).

overcrowded minority schools instead of reassigning students. Earlier (p. 7) we quoted *Crawford* plaintiffs' counsel's description of the *Crawford* plaintiffs' efforts to establish "the continuing existence of de jure conduct" (Appendix, p. 215a) throughout the remedy proceedings.

After the hearings which followed the District's Proposition 1 application, the *Crawford* plaintiffs submitted proposed findings of fact and conclusions of law. These proposed findings and conclusions, which the state trial court adopted without change, relied primarily on findings and conclusions entered after the 1969 trial. However, they also stated that the District had continued to maintain a segregated school system in violation of federal law. Appendix at pp. 237a-244a. It is impossible to reconcile either these 1980 findings or the assertion by the *Crawford* plaintiffs' counsel "the continuing existence of de jure conduct" by the District with the statement in the decision below that the *Crawford* plaintiffs did not litigate claims of contemporaneous de jure conduct after 1969.

Nothing in the opinions of this court — or in California law — supports the conclusion of the court below that plaintiffs in a state desegregation case can attempt to establish de jure conduct during 12 years of remedy proceedings without being precluded from relitigating those same de jure claims (and others arising during the same period) in a subsequent federal action. To the contrary, as this court has consistently held, and as the opinion below appears to recognize at page 740, once plaintiffs litigated post-1969 alleged de jure conduct at all, they were required to do so fully. *Allen v. McCurry, supra, Kremer v. Chemical Construction Corp., supra.* The same requirement exists under California law. *Boccardo v. Safeway Stores, Inc.*, 134 Cal.App.3d 1037, 184 Cal.Rptr. 903 (1982).

C. The "Remedy Exception" Created by the Decision Below Also Contravenes California State Law.

In reaching the determination that the claim preclusion effect of *Crawford* applies only to de jure claims arising before May 2, 1969, the decision below relies on a purported rule in California that the "scope of litigation is framed by the complaint at the time it is filed." 750 F.2d at 739. Specifically, the opinion concludes that the claims barred by *Crawford* are defined by the original complaint filed in 1963, as supplemented by the parties' stipulation to consider events from 1963 to the close of the first trial in May 1969; claims arising after May 1969 are not barred because in California claim preclusion " 'does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated.' " *Id.* While this rule may apply in some actions at law, California courts have made it abundantly clear that in equitable proceedings such as *Crawford*,

> "... where equity has acquired jurisdiction for one purpose it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the causes of action presented."
>
> *Pailhe v. Pailhe*, 113 Cal.App.2d 53, 64-65, 247 P.2d 838 (1952).

Accord, Bruce v. Gregory, 65 Cal.2d 666, 672-73, 56 Cal.Rptr. 265, 423 P.2d 193 (1967) (In an action on a petition for writ of mandate, "[o]nce the court reaches the merits of the case, it should consider all relevant facts, regardless of when they come into existence.").

In California, equitable powers are so broad that the pleadings do not rigidly define the court's functions, as the opinion below suggests. Instead, as the court held in *Coons v. Henry*, 186 Cal.App.2d 512, 519, 9 Cal.Rptr. 258 (1960), California law requires a court to resolve all

matters before it in order to preclude further litigation
the same subject.

> "It is a cardinal rule of equity practice that unde
> prayer for general relief the court may grant
> relief conformable to the case made by the pleadi
> and the evidence, although it may not be the re
> asked by a special prayer. This rule is based upon
> fundamental principle of chancery that a court
> equity will endeavor to finally dispose of litigation
> as to preclude further litigation between the sa
> parties and upon the same subject matter. [citati
> It is also an accepted rule that when a party co
> into a court of equity pleading facts which entitle
> to some equitable relief, the court will assume ju
> diction of the entire controversy, notwithstand
> the form of the pleading, and will disregard
> specific prayers in order to grant relief which
> proof warrants as within the equities of the en
> case. [citation]"

The opinion below places great importance upon s
plemental pleadings as the necessary vehicle for litigat
claims arising after commencement of an equitable l
suit. This, too, is an entirely incorrect view of Califor
law. As the court explained in *Collins v. Sargent*,
Cal.App. 107, 112-113, 264 P. 776 (1928), a court exer
ing equitable powers must afford relief based upon
facts that exist at the close of the litigation, whether
not a supplemental pleading has been filed:

> "The general rule, to which there are exceptions
> that in actions at law the right to judgment depe
> upon the facts as they exist at the commencement
> the action, but such is not the rule in equity.
> relief administered in equity is such as the nature
> the case, and the facts as they exist at the close of
> litigation, demand; and supplemental complai.'s

> not required in actions in equity in order to bring before the court those facts and circumstances occurring since the filing of the original complaint, which bear as evidence upon the facts in issue in the original cause. It would be surplusage if they were set up in a supplemental pleading, and equity does not require a useless thing."

Accord, Hutcherson v. Alexander, 264 Cal.App.2d 126, 136, 70 Cal.Rptr. 366 (1968); *Schaefer v. Berinstein*, 180 Cal.App.2d 107, 134, 4 Cal.Rptr 236 (1960).

II

THIS IS AN APPROPRIATE CASE FOR THE ADOPTION OF A FEDERAL STANDARD OF CLAIM PRECLUSION FOR THE FEDERAL CLAIMS PREVIOUSLY LITIGATED IN *CRAWFORD*.

The District submits that it has demonstrated in part I that the decision below erroneously applied 28 U.S.C. § 1738 and that this Court should grant certiorari so that the purpose and scope of § 1738 may be properly defined for lower federal courts. Solely as an alternative ground to support the granting of this petition and to avoid the miscarriage of justice that otherwise would result, the District suggests that the present case warrants the application of a federal claim preclusion standard independent of § 1738.

The opinion below recognizes that federal claims were advanced and litigated during the state court proceedings in *Crawford*. 750 F.2d at 745. Even if a California court would permit the relitigation of those federal claims,

> "[t]here is no reason to hold that a federal court may not give preclusive effect to a state judgment simply because the judgment would not bar relitigation in

> the state courts. If the federal courts have developed rules of res judicata and collateral estoppel that prevent relitigation in circumstances that would not be preclusive in state courts, the federal courts should be free to apply them, the parties then being free to relitigate in the state courts."
>
> *Migra v. Warren City School District Board of Education,* ____ U.S. ____ 104 S.Ct. 892, 900 (1984) (concurring opinion).

The District believes that this is an appropriate case in which to adopt the federal claim preclusion standards urged by the concurring opinion in *Migra.* The parties in this case spent nearly twenty years litigating federal and state constitutional claims. If that litigation had occurred in federal rather than state court, there is no question that federal standards of claim preclusion would bar plaintiffs from pursuing any of the claims which might have been raised through the date the final judgment was entered in the first action. *Bronson v. Board of Education,* 687 F.2d 836 (6th Cir. 1982). Having elected to pursue their second action in federal court and enjoy the benefits of a federal forum, plaintiffs should not be permitted to assert immunity from the rules of claim preclusion which govern that forum.

In reaching such a conclusion here, this Court need not disturb holdings in other cases decided by this Court under 28 U.S.C. § 1738. That is because none of those cases involved the precise issue presented here: whether a federal claim preclusion standard should be adopted with regard to federal law claims that were actually litigated and decided in state court.

For example, in the seminal case of *Union & Planters' Bank v. Memphis,* 189 U.S. 71, 75 (1903), this Court held that a Tennessee Supreme Court decision invalidating

certain city tax assessments would have no res judicata effect with respect to identical assessments for later years. In reaching its conclusion, this Court determined that Tennessee courts would not consider the earlier holding res judicata for subsequent assessments, and held that a federal court cannot under 28 U.S.C. § 1738 attach greater preclusive effect to a state court judgment resolving state law claims than would the courts of the state from which the judgment emerged.

On three occasions this Court has followed *Union & Planters' Bank.* In each instance, this Court looked to the law of the state from which the judgment originated to determine the res judicata effect to be accorded to a state court judgment resolving state law claims. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.,* 309 U.S. 4, 7-8 (1940) (utility rates); *Wright v. Georgia R.R. and Banking Co.,* 216 U.S. 420, 429 (1910) (tax assessment); *City of Covington v. First National Bank,* 198 U.S. 100, 107-109 (1905) (tax assessment).

This case presents an entirely different issue than those decided in *Union & Planters' Bank, Oklahoma Packing Co., Wright,* and *City of Covington.* Each of those cases decided that federal courts must apply state claim preclusion standards in deciding whether state law claims are barred in subsequent actions in federal court. The facts now before this Court do not involve that question. This case instead involves federal law claims which plaintiffs seek to litigate a second time in federal court.

Last year this Court held in *Migra v. Warren City School Board of Education, supra,* that federal courts should follow state claim preclusion standards in deciding whether a party may litigate federal law claims that possibly could have been litigated, but were not actually raised, in state court. This Court reached a similar conclusion in *Haring v. Prosise,* 462 U.S. 306 (1983). *See also*

Marrese v. American Academy of Orthopaedic Surgeons, ___ U.S. ___, 105 S.Ct. 1327 (1985).

Once again, this case presents a much different question than the issues decided in *Migra*, *Haring* and *Marrese*. There are sound justifications why a federal claim preclusion standard should not be employed for federal law claims which were not actually litigated in state court. Because state procedure laws might not permit the joinder of federal claims in a state action, the adoption of federal claim preclusion standards to federal claims that were never raised in the prior state action could entirely deprive a party of the opportunity to have his claims heard in any court. In such cases, it is necessary to examine state law to determine whether the federal claims could have been litigated in the prior action.

The justifications for following state claim preclusion standards disappear when the federal law claims have actually been litigated in the prior state court action. Just because a unique provision of state procedural law may permit a party to pursue a federal law claim a second time does not mean that the same state law provision should dictate that result in federal court. Federal courts should be entitled to apply their own claim preclusion standards regarding federal law claims that were actually litigated, and a party who disagrees with that result should remain in state court.

The reason for adopting the federal standards for claim preclusion are particularly persuasive in this case. The parties have already engaged in protracted state court litigation. Actions of the District were examined and reexamined in painstaking detail, resulting in the countless state court proceedings summarized on page 9 of this petition. The present federal court action — which has already occupied four years of extensive litigation on

preliminary issues — only promises to repeat the same process.

CONCLUSION

The decision below rewards a form of legal gamesmanship that should be vigorously discouraged lest legal procedures fall even lower in the esteem of an increasingly skeptical public. Burger, Warren E., *The State of Justice,* ABA Journal, April 1983, at 62. The decision below would, with its mistaken application of 28 U.S.C. § 1738, cancel the history of the *Crawford* case, and require the relitigation of its last twelve years.

For all of these reasons a writ of certiorari should issue to review the judgment and the opinion of the Ninth Circuit.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX A

LOS ANGELES BRANCH NAACP ET AL., PLAINTIFFS-APPELLEES,
v.
LOS ANGELES UNIFIED SCHOOL DISTRICT, ET AL.,
DEFENDANTS-APPELLANTS.
No. 81-5772.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted April 10, 1984.
Decided Dec. 21, 1984.
As Modified on Denial of Rehearing
and Rehearing En Banc
Feb. 21, 1985.

omas I. Atkins, General Counsel, N.A.A.C.P. Special ribution Fund, Brooklyn, N.Y., for plaintiffs-llees.

William Shea, Peter W. James, McCutchen, Black, eger & Shea, Los Angeles, Cal., for defendants-llants.

peal from the United States District Court for the ral District of California.

fore BROWNING, Chief Judge, CHOY, WAL-E, SNEED, ANDERSON, PREGERSON, POOLE, SON, CANBY, BOOCHEVER and NORRIS, Cir-Judges:

NBY, Circuit Judge:

e took this case en banc to decide the extent to which loctrine of res judicata bars this class action alleging tional segregation in the Los Angeles public schools olation of the United States Constitution. Defendants

moved in district court for summary judgment on the ground that plaintiffs were seeking in this action to relitigate the same claim that had been litigated and decided in *Crawford v. Board of Education,* 113 Cal. App.3d 633, 170 Cal.Rptr. 495 (1980) *aff'd,* 458 U.S. 527, 102 S.Ct. 3211,73 L.Ed.2d 948 (1982). The district court denied the motion, 518 F.Supp. 1053, and certified this interlocutory appeal. 28 U.S.C. § 1292(b).

I.

FACTS

The *Crawford* litigation began in 1963 as a class action on behalf of black high school students seeking to desegregate a high school in Los Angeles. Before trial, the complaint was amended to assert a desegregation claim on behalf of all black and Hispanic students attending school in the Los Angeles Unified School District. The case was filed in the California courts just months after the California Supreme Court, in *Jackson v. Pasadena City School District,* 59, Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963), held that school boards in the state were under a state constitutional obligation to take reasonable steps to alleviate racial segregation in the schools, regardless of whether the segregation was de facto or de jure in nature. The case went to trial in 1968 under a stipulation that permitted the court to consider activities of the defendants occurring from May 1, 1963 to the time of trial. The trial court rendered its decision on May 12, 1970, finding that the District schools were substantially segregated and concluding that this segregation was both de facto and de jure in origin.

On appeal, the California Supreme Court refused to affirm on the basis of the trial court's conclusion of de

jure segregation. *Crawford v. Board of Education*, 17 Cal.3d 280, 130 Cal.Rptr. 724, 551, P.2d 28 (1976) *(Crawford I)*. Instead, it chose to affirm on the basis of its previous decision in *Jackson* that the California Constitution imposed a duty upon school boards to take reasonably feasible steps to alleviate segregation in the public schools, regardless of its cause. *Id.* at 301-02, 130 Cal.Rptr. at 738, 551 P.2d at 42. The court then remanded the cause to the trial court for the development of a reasonably feasible desegregation plan.

On remand, the trial court rejected the largely voluntary desegregation plan submitted by the School District and ordered the implementation of a plan calling for large-scale mandatory pupil reassignment and transportation. The court-ordered plan went into effect in the fall of 1978. In October 1979, the trial court began hearings to determine the constitutional sufficiency of its court-ordered plan. On November 6, 1979, before the hearings could be completed, the voters of California approved Proposition I,[1] an initiative measure which amended the

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[1]Proposition I amended art. 1, § 7(a) of the California Constitution which now provides, in relevant part:

> (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligation or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdividison or any other provision of this Constitution, no court of this state may impose upon the State of California or any other public entity, board or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that

California Constitution to limit the power of state courts to order mandatory pupil reassignment and transportation on the basis of race. In effect, the state courts were forbidden to order those measures except in circumstances where federal courts could do so to remedy violations of the United States Constitution. In addition, Proposition I authorized any court having jurisdiction, upon application by any interested person, to modify existing judgments or decrees containing provisions for mandatory pupil reassignment and transportation, unless such modification would be prohibited by the United States Constitution.

Following passage of Proposition I, the School District applied to the California courts for an order halting mandatory pupil reassignment and transportation in the District. On May 19, 1980, the Superior Court denied the application on the ground that the trial court in *Crawford I* had found de jure segregation and thus the elimination of mandatory pupil reassignment and transportation in the District would be prohibited by the United States Constitution. The Superior Court thereafter issued a new

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would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

order on July 7, 1980, substantially continuing the 1978 desegregation plan.

The California Court of Appeal reversed and vacated the July 7, 1980, desegregation order. *Crawford v. Board of Education,* 113 Cal.App.3d 633, 643, 170 Cal.Rptr. 495 (1980) (*Crawford II*). The appellate court determined that the 1970 findings by the trial court in *Crawford I* did not support its conclusion of de jure segregation, when viewed in light of subsequent Supreme Court decisions emphasizing the need for showing specific discriminatory intent. Because the Court of Appeal viewed the findings as establishing only de facto segregation in the District schools, it concluded that a federal court would not be authorized under federal law to order pupil assignment and transportation. Consequently, Proposition I barred the state court from doing so. The court thereupon vacated the orders of May 19, 1980, and July 7, 1980, and remanded to the Superior Court "for further proceedings consistent with this opinion." The California Supreme Court refused review on March 11, 1981, and the case was remitted to the Superior Court on the next day.[2]

Following the remittitur,[3] the District submitted a revised desegregation plan with no mandatory pupil reassignment or mandatory busing. The plan was accepted by the Superior Court, with modifications, on September 10,

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[2]The United States Supreme Court granted certiorari limited to the question of the constitutionality of Proposition I. *See Crawford v. Board of Education,* 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982). The plaintiffs did not seek review of the Court of Appeal's conclusion that de jure segregation had not been proved.

[3]In California, the term "remittitur" refers to the mandate of the appellate court. Remittitur has the effect of transferring jurisdiction to the trial court. 6 Witkin, *California Procedure,* Appeal Part I, §§ 516-518 (1971).

1981. On November 25, 1981, the Superior Court awarded plaintiffs attorneys' fees and costs and, declaring that the "underlying issues have been resolved," terminated jurisdiction. The *Crawford* plaintiffs appealed the September 10, 1981 order but dropped their appeal on May 24, 1983, thus closing the last chapter of the *Crawford* litigation.[4]

The NAACP filed the present case while *Crawford* was still pending in the California Superior Court following the remittitur from *Crawford II*. The district court refused to give res judicata effect to the *Crawford* litigation because it determined that no final judgment had yet been entered in that case and that retrial of the de jure issue on remand had not been foreclosed by the appellate court's remittitur.[5] A three-judge panel of this court reversed the district court on the ground that the *Crawford* judgment had since become final and that therefore relitigation of the claim that the District was segregated de jure on or before September 10, 1981, was barred by the doctrines of res judicata and collateral estoppel.[6] We granted the NAACP's petition for rehearing en banc and withdrew the opinion of the three-judge panel.[7] Because we agree that relitigation of the de jure claim is barred by the doctrine of res judicata, we reverse the order of the

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[4]*Crawford v. Board of Education*, No.2d Civil 67706 (Cal.Ct.App. May 24, 1983). The District appealed the November 25, 1981 award of attorneys' fees. That appeal has since been dismissed pursuant to a stipulated order entered April 16, 1984. Therefore, all issues arising out of the Crawford proceedings have now been finally resolved.

[5]*Los Angeles Branch NAACP v. Los Angeles Unified School District*, 518 F.Supp. 1053 (C.D.Cal. 1981).

[6]*Los Angeles Unified School District v. Los Angeles Branch NAACP*, 714 F.2d 935 (9th Cir. 1983).

[7]725 F.2d 1257 (9th Cir.1984).

district court. We determine the bar, however, to apply only to events occurring on or before May 2, 1969.

II.

Res Judicata

The state court judgment in the *Crawford* litigation is entitled to the same preclusive effect in this court as it would be accorded in a California court, whether the effect is one of claim preclusion or issue preclusion. 28 U.S.C. § 1738; *Migra v. Warren City School District Board of Education*, ____ U.S. ____, 104 S.Ct. 892, 896-98, 79 L.Ed.2d 56 (1984). Under California law, the claim preclusion aspect of res judicata, also referred to as bar or merger, precludes the maintenance of a second suit between the same parties on the same cause of action so long as the first suit concluded in a final judgment on the merits. *Agarwal v. Johnson*, 25 Cal.3d 932, 954, 160 Cal.Rptr. 141, 155, 603 P.2d 58, 72 (1979); *Slater v. Blackwood*, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 226, 543 P.2d 593, 594 (1975). All issues that were litigated or that might have been litigated as part of the cause of action are barred. *Olwell v. Hopkins*, 28 Cal.2d 147, 152, 168 P.2d 972, 975 (1946). The parties no longer dispute that there is now a final judgment on the merits in *Crawford*. We therefore turn our attention to the more complex problem of determining whether this action involves the same cause of action and the same parties as *Crawford*.

A.

Identity of Claims

The plaintiffs argue that the claim sued upon in this action is not the same as that in *Crawford*. They contend

that the *Crawford* plaintiffs sued for violation of a right arising under the state constitution—the right to be free of de facto segregation. Plaintiffs assert that here they are suing for violation of a right arising under the Federal Constitution—the right to be free of de jure segregation. There are at least two major flaws in plaintiffs' argument.

First, the record in *Crawford* simply does not support the contention that plaintiffs there confined their claim to de facto segregation in violation of state law. The *Crawford* plaintiffs pleaded violations of the Fourteenth Amendment. They successfully moved the state court to be allowed to show bad faith on the part of the School District in maintaining segregation in the schools, injecting the element of defendants' intent into the trial. The findings and conclusions of the state trial judge directly addressed de jure segregation as a violation of Federal Constitution. It is true that the California Supreme Court in *Crawford I* chose not to rely on the de jure findings, but that fact did not permanently remove the de jure issue from the case. When the School District moved to modify the desegregation plan after the passage of Proposition I, the *Crawford* plaintiffs responded in a memorandum of April 23, 1980, to the state trial court: "In *Crawford,* the Court heard and decided the Fourteenth Amendment issues and defense, and found de jure segregation. The violations and defense were pleaded, argued, and decided. They cannot now be relitigated by invasion of the final judgment." Thereafter, the California Court of Appeal addressed the de jure issues and held that the trial court's 1970 findings did not support a conclusion of de jure segregation. 113 Cal.App.3d at 645-46, 170 Cal.Rptr. at 503-04. The de jure issue had to be addressed at that time in order to determine the effect of Proposition I on the existing desegregation plan that included mandatory

pupil reassignment and transportation. In view of this record, it is not possible to accept the contention of plaintiffs here that the *Crawford* litigation had nothing to do with de jure segregation in violation of the United States Constitution.

The second major flaw in plaintiffs' argument is that it misconceives the scope of a cause of action under California law. As plaintiffs correctly point out, California follows the "primary rights" theory, under which the right sought to be enforced determines the cause of action. *See* 3 Witkin, California Procedure, Pleadings § 22 (1971). The invasion of more than one primary right gives rise to as many causes of action as rights violated, even though all may arise from a single set of facts. *See, e.g., Sawyer v. First City Financial Corp.*, 124 Cal.App.3d 390, 399, 177 Cal.Rptr. 398, 403 (1981). California's rule, however, does not mean that different causes of action are involved just because relief may be obtained under either state or federal law, or under either of two legal theories. *See Boccardo v. Safeway Stores, Inc.*, 134 Cal.App.3d 1037, 1043, 1054, 184 Cal.Rptr. 903, 907, 914 (1982); *City of Los Angeles v. Superior Court*, 85 Cal.App.3d 143, 150, 152, 149 Cal.Rptr. 320, 325 (1978). Two recent Caifornia cases illustrate the distinction. In *Mattson v. City of Costa Mesa*, 106 Cal.App.3d 441, 447, 164 Cal.Rptr. 913, 197 (1980), the plaintiff had previously brought a federal civil rights action alleging assault and wrongful arrest. He then brought an action in state court alleging that the same conduct constituted the common law tort of negligence. The California Court of Appeal held that the second action was barred because both actions sought redress for injury to plaintiff's interest in personal security and integrity. To be contrasted with *Mattson* is *Agarwal v. Johnson*, 25 Cal.3d 932, 954, 160 Cal.Rptr. 141, 155, 603 P.2d 58, 72 (1979). There plaintiff first brought suit in

federal court for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. He subsequently was permitted to sue his employer in state court for the common law torts of defamation and intentional infliction of emotional distress arising out of the same discriminatory employment practice. The California Supreme Court held that the federal action was brought to remedy the economic loss in wages, while the state action was brought to redress injuries to the different interests in reputation and peace of mind. As both *Mattson* and *Agarwal* indicate, the single most important factor in determining whether a single course of conduct has violated more than one primary right is whether plaintiff suffered injury to more than one interest. *See also Ford Motor Co. v. Superior Court,* 35 Cal.App.3d 676, 679, 110 Cal.Rptr. 59, 61 (1973).

In light of these decisions, we are unable to accept plaintiffs' contention that they are attempting to enforce a different primary right than were the plaintiffs in *Crawford.* We would adhere to that conclusion even if the *Crawford* litigation had been confined to de facto segregation in violation of state law. The right to be free from de facto segregation is not a thing apart from the right to be free from de jure segregation; the former necessarily encompasses the latter. The California Supreme Court in *Crawford I* held that school boards had an affirmative duty to take reasonable steps to eliminate both de facto and de jure segregation. 17 Cal.3d at 301-02, 130 Cal.Rptr. at 738, 551 P.2d at 42. That duty survived Proposition I. *Crawford II,* 113 Cal.App.3d at 655, 170 Cal.Rptr. at 510. The California Supreme Court clearly regarded the injury from both kinds of segregation to be the same: "[T]here is virtually no dispute that the practical effect of segregated schooling on minority children

does not depend upon whether a court finds the segregation de jure or de facto in nature; the isolation and debilitating effects do not vary with the source of the segregation." *Crawford I,* 17 Cal.3d at 301, 130 Cal.Rptr. at 737-38, 551 P.2d at 41-42. *See also Keyes v. School District No. 1,* 413 U.S. 189, 229-30 & n. 14, 93 S.Ct. 2686, 2707-08 & n. 14, 37 L.Ed.2d 548 (1973) (Powell, J., concurring). We can only conclude that California regards the primary right underlying de jure and de facto claims to be one and the same—"the right to an equal opportunity for education."[8] *Crawford I,* 17 Cal.3d at 305, 130 Cal.Rptr. at 740, 551 P.2d at 44. *See also Crawford II,* 113 Cal.App.3d at 649, 170 Cal.Rptr. at 506. Since the primary right enforced in *Crawford* was the same as the primary right asserted in this litigation, the present action is barred as to all matters that might have been litigated by the same parties in *Crawford.*

Our conclusion that the same primary right is involved also puts to rest the contention that the federal claim is not barred because the federal right is narrower than the state right. It is true that federal law does not place school boards under a duty to alleviate de facto segregation. *See Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 435-36, 96 S.Ct. 2697, 2704-05, 49 L.Ed. 2d

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[8]The distinction between de facto and de jure segregation is not unlike that between intentional torts and those involving negligence or strict liability. In each case, the difference consists only in the nature of the defendant's state of mind, and not in the nature of the harm suffered by the plaintiff. It is for this reason that the "primary rights" theory recognizes only one cause of action for a single personal injury regardless of whether defendants' liability might be grounded on several tort theories. *See, e.g., Slater v. Blackwood,* 15 Cal.3d at 791, 126 Cal.Rptr. at 225, 543 P.2d at 594-95; *Panos v. Great Western Packing Co.,* 21 Cal.2d 636, 134 P.2d 242 (1943). By analogy, the same principle is applicable here.

599 (1976); *Washington v. Davis,* 426 U.S. 299, 240, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). The right to desegregate is therefore greater under California law than under the Federal Constitution, as the Supreme Court observed in *Crawford v. Board of Education,* 458 U.S. 527, 535, 102 S.Ct. 3211, 3216, 73 L.Ed.2d 948 (1982). But the doctrine of res judicata, in California as elsewhere, not only bars the maintenance of the identical cause of action in a subsequent suit by the same parties. It also bars the maintenance of a subsequent action *on any part* of the original cause of action, even if that part was not litigated in the prior action. Restatement of Judgments § 62 (1942), *cited with approval in Mattson v. City of Costa Mesa,* 106 Cal.App.3d at 449, 164 Cal.Rptr. at 918. Similarly, a plaintiff with a claim suported by both state and federal law may not bring separate actions on each ground; the first action precludes the second if the first court had jurisdiction to adjudicate both grounds. *Migra v. Warren City School District Board of Education,* 104 S.Ct. at 898; Restatement (Second) of Judgments § 61.1 comment e (1982).

Res judicata claim preclusion does not, of course, bar plaintiffs from litigating matters that were not within the scope of the claim litigated in *Crawford.* The *Crawford* claim necessarily included all segregative acts of the District occurring prior to commencement of the *Crawford* litigation in August 1963. *See* Restatement (Second) of Judgments § 24, comment d, § 26, comment h (1980). The stipulation of the parties, accepted by the trial court, extended the scope of the claim to cover the period from 1963 to the time of the trial. The trial court considered the effects of School District inaction up to the end of the trial, and the California Supreme Court in affirming in *Crawford I,* characterized the trial court's findings and conclusions as covering the "relevant time period—which

ran through the conclusion of the trial in May 1969." 17 Cal.3d at 288, 130 Cal.Rptr. at 728, 551 P.2d at 32. We conclude, therefore, that segregative acts occurring before the close of the *Crawford* trial of the merits on May 2, 1969 fall within the bar of res judicata.

It has been argued, and the three judge panel of this court held, that the bar of the *Crawford* litigation must extend to all segregative acts occurring prior to September 10, 1981, the date that trial court terminated the litigation on the merits and discharged the writ of mandate. We reject that position. The scope of litigation is framed by the complaint at the time it is filed. The rule that a judgment is conclusive as to every matter that might have been litigated "does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated." *Kettelle v. Kettelle,* 110 Cal.App. 310, 312, 294 P. 453, 454 (1930); see *Lord v. Garland,* 27 Cal.2d 840, 849, 168 P.2d 5, 11 (1946); *Brown v. Brown,* 170 Cal. 1, 4, 147 P. 1168, 1170 (1915); *Metropolis Trust & Savings Bank v. Barnet,* 165 Cal. 449, 452-53, 132 P. 833, 834 (1913). Plaintiffs may bring events occurring after the filing of the complaint into the scope of the litigation by filing a supplemental complaint with leave of court, Cal.Civ.Proc.Code § 464, but there is no requirement that plaintiffs do so.[9] The stipulation of the parties that permitted the court to

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[9]In equity, a court in fashioning its decree may take into account facts occurring after the filing of the complaint, and no supplemental pleading is required. *Collins v. Sargent,* 89 Cal.App. 107, 112-113, 264 P. 776, 779 (1928). While that rule may often accomplish the purpose of avoiding further litigation, we view its primary function as one of insuring realistic relief. *See* note 10, *infra.* We have been referred to no cases where the rule was extended to bar subsequent litigation of claims that arose during previous litigation but were not made the subject of supplemental pleadings. We decline to impose a potentially

consider events occurring from 1963 to the time of trial was clearly intended to operate as a supplemental pleading, but it specified that "[t]he rights of petitioners, if any, and the duties of respondent, if any, shall be determined as of the time of trial." It therefore cannot have extended the durational scope of the litigation past the close of trial of the merits on May 2, 1969—the date that the California Supreme Court stated to be the end of the period relevant to the trial court's findings and conclusions.

If the *Crawford* plaintiffs had actually litigated the liability of the District for segregative acts occurring after May 2, 1969, then the res judicata bar would have to expand to encompass those events and others that might have been litigated with them. The record indicates, however, that the *Crawford* plaintiffs did not so open the litigation to later events. Judge Gitelson entered his findings and conclusions on May 12, 1970. The California Supreme Court affirmed on June 28, 1976 *(Crawford I)*. The case was then remanded for the adoption and approval of a desegregation plan. All further proceedings were concerned entirely with the appropriateness and legality of various Board plans, before and after passage of Proposition I.

It is true that the *Crawford* plaintiffs litigated the constitutionality of Proposition I, but that was an argument over remedy, not right. Indeed, the plaintiffs' memorandum of December 19, 1979, contended that Proposition I was unconstitutional because it retroactively deprived plaintiffs of the benefits of the 1970 findings and mandate, which they contended were res judicata.

The decision in *Crawford II* on December 19, 1980, was entirely a review of the 1970 findings and conclusions. It did no purport to deal with any school board actions subsequent to that time. After the remittitur, plaintiffs contended in the trial court that the board resolution of March 16, 1981, was unconstitutional, by its own force and because it violated the mandates of *Crawford I* and *II*. The unconstitutionality of the Board resolution was urged not as a new source of liability, but as a ground for holding the Board's plan to be improper as relief.

The two final orders in the *Crawford* litigation drive the point home further. Judge Lopez' order of September 10, 1981, which ended the litigation on the merits, held that the Board had "satisfied the mandate of the Court issued on May 19, 1970," as interpreted in *Crawford I* and *II*, and accordingly discharged the writ of mandate. In his final order awarding attorneys' fees and terminating jurisdiction on November 25, 1981, Judge Lopez recited that the case could best be thought of in two parts: the first relating to the "trial of the right of the children to a desegregated education" that ended in a judgment affirmed in 1976, and the second the enforcement of that judgment. "Since 1976, this case has been in the remedy enforcement phase. The sole task before the court was the supervision of the evolution and adoption of a Plan for desegregation. No rights were at issue."[10]

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[10] Proposition I is framed as a limitation upon remedy. For that reason, we do not accept the view put forth in Judge Sneed's partial dissent that Proposition I caused the entire factual case on liability to be reopened and supplemented upon the Board's post-Proposition application to modify the original decree. Any desegregation decree, original or modified, must take current facts into account to insure that the decree is properly tailored to remedy the violation of right that was pleaded and proved. That is the sense in which we read the requirement of Proposition I that decrees be modified to conform to

The *Crawford* record therefore supports the view that the scope of the claim litigated in that case did not include any segregative acts of the District occurring after May 2, 1969. The claim preclusion bar of Crawford therefore extends only to segregative acts occurring on or before May 2, 1969. Any acts of de jure segregation committed by defendants after that date are not precluded and may be pursued by plaintiffs in this litigation. In such ensuing proceedings, the parties may introduce evidence of events occurring on or before May 2, 1969, so long as it is relevant to a claim of de jure segregative acts committed by defendants after that date. They may not, however, relitigate any claim that the District had committed de jure segregation on or before May 2, 1969. *See Bronson v. Board of Education*, 525 F.2d 344, 350 (6th Cir.1975), *cert. denied*, 425 U.S. 934, 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976).

B.
Identity of Parties

A judgment on behalf of a class binds all persons belonging to the class and all those who subsequently come into the class. *King v. International Union of Operating Engineers*, 114 Cal.App.2d 159, 164-65, 250 P.2d 11, 14 (1952); *see Cooper v. Federal Reserve Bank of Richmond*, ___ U.S. ___, ___, ___, 104 S.Ct. 2794, 2798, 2802, 81 L.Ed.2d 718 (1984). The plaintiff class in *Crawford* consisted of all black and Hispanic children attending school

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the Proposition "as applied to the facts which exist at the time of the modification." It is apparent from the remarks of Judge Lopez quoted above that he held a similarly limited view of the purpose of the post-Proposition I proceeding.

in the Los Angeles Unified School District.[11] It is clear from the final order of the state trial court on September 10, 1981, that the class remained open to that date, because the relief encompassed, and was intended to benefit, black and Hispanic children in school on that date.

The class certified in the present action includes all existing and future black students who are or become eligible to attend the District's schools during the pendency of this action. The present class therefore comprises some members who were also members of the Crawford class and others who were not. The former are clearly bound by *Crawford* under the traditional application of res judicata; the latter are not. *See* 3 Witkin, *supra*, Judgments § 282. California has expanded the traditional rule, however, to apply the preclusive effect of a prior judgment to nonparties whose interests were "virtually represented" by one of the parties to the litigation. *See e.g., Rynsburger v. Dairymen's Fertilizer Corp.*, 266 Cal.App.2d 269, 278, 72 Cal.Rptr. 102, 107-08 (1968); *King v. International Union of Operating Engineers*, 114 Cal.App.2d at 164, 250 P.2d at 13. The nonparty is bound under the rule if he was "so far represented by others that his interest received actual and efficient protection." *Rynsburger*, 266 Cal.App.2d at 278, 72 Cal.Rptr. at 107; *see also Aerojet-General Corp. v. Askew*, 5 F.2d 710, 719 (5th

[11] The class in *Crawford* was never formally certified. No procedure for such certification existed in California prior to 1973. The California courts treated *Crawford* as a class action throughout, *see Crawford I*, 17 Cal.3d at 286, 551 P.2d at 31, 130 Cal.Rptr. at 727; *Crawford II*, 113 Cal.App.3d at 647-50; 70 Cal.Rptr. at 504-06. We therefore treat it as a class action for purposes of res judicata. *See Jackson v. Hayakawa*, 605 F.2d 1121, 1126 & n. 7 (9th Cir. 1979), *cert. denied*, 445 U.S. 952, 100 S.Ct. 1601, 63 L.Ed.2d 787 (1980); *see also Johnson v. General Motors Corp.*, 598 F.2d 432, 434-35 (5th Cir.1979).

Cir.1975). The application of this doctrine to desegregation cases is particularly appropriate. It has been recognized that unless subsequent generations of school children are bound by preclusion rules from relitigating identical claims of unlawful segregation, those claims would assume immortality. *See, e.g., Bell v. Board of Education,* 683 F.2d 963, 966 (6th Cir.1982); *Bronson v. Board of Education,* 525 F.2d 344, 349 (6th Cir.1975), *cert. denied,* 425 U.S. 934, 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976).

We see no reason why the California courts would not apply the doctrine of virtual representation here to preclude post-1981 black school children from litigating any part of the cause of action litigated in *Crawford.* There is no contention by plaintiffs that the *Crawford* class was inadequately represented. Nor have they made any showing that the interests of the two classes are different. Although Proposition I limited the remedies available to the state courts for alleviating de facto segregation, it did not alter the substantive right that had been recognized in *Jackson* and *Crawford I. Crawford II,* 113 Cal.App.3d at 655-56, 170 Cal.Rptr. at 509-10. The relief granted and the relief available in *Crawford* would not have changed its character had all the members of the present plaintiff class been parties.

We conclude, therefore, that the California courts would give preclusive effect to the *Crawford* judgment against all plaintiffs in this case as to any claim of unlawful segregative actions taken by the School District on or before May 2, 1969. We can give *Crawford* no less effect than California would. 28 U.S.C. § 1738.

III.

Full and Fair Opportunity

It is suggested that although ordinary claim preclusion rules might bar the relitigation of pre-1969 de jure segregation, they should not be applied in this case because to do so would constitute manifest injustice. The injustice that is urged is that there was no full and fair opportunity to litigate the de jure claim in *Crawford*. There is authority in California for the proposition that a court may refuse to apply res judicata where to do so would defeat the ends of justice. *See, e.g., Greenfield v. Mather*, 32 Cal.2d 23, 35, 194 P.2d 1, 8 (1948). Although the California Supreme Court has questioned the current validity of the *Greenfield* rule, it has not expressly overruled it. *See Slater v. Blackwood*, 15 Cal.3d at 796, 126 Cal.Rptr. at 227, 543 P.2d at 595. The lower California courts have continued to apply the rule, at least where there was no meaningful opportunity to litigate the claim in the prior action. *See, e.g., Ruddock v. Ohls*, 91 Cal.App.3d 271, 281, 154 Cal.Rptr. 87, 91 (1979); *Hight v. Hight*, 67 Cal.App.3d 498, 136 Cal.Rptr. 685 (1977). *See also Ackerman v. Ackerman*, 676 F.2d 898, 905 (2d Cir. 1982) (applying California preclusion law pursuant to 28 U.S.C. § 1738). Whether or not *Greenfield* remains good law in California,[12] it does not apply in this case because plaintiffs had a full and fair opportunity to litigate their claim in *Crawford;* giving effect to the *Crawford* judgment consequently would not cause manifest injustice.

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[12]For cases since *Slater* finding the rule inapplicable, *see, e.g., Fehlhaber v. Fehlhaber*, 702 F.2d 81 (5th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 79, 78 L.Ed.2d 90 (1983); *Stuart v. Real Estate*, 148 Cal.App.3d 1, 195 Cal.Rptr. 524 (1983); *Fellers v. Fellers*, 125 Cal.App.3d 254, 178 Cal.Rptr. 35 (1981).

Plaintiffs contend that *Jackson v. Pasadena City School District,* decided just before the *Crawford* action was initiated, deprived the *Crawford* plaintiffs of any incentive to litigate the de jure question. *See Ackerman,* 675 F.2d at 905 (no meaningful opportunity when plaintiff lacked any incentive to litigate). It is questionable that the *Crawford* plaintiffs would have read so expansively the dicta in *Jackson* that "under some circumstances" a student whose school was racially imbalanced solely because of residential segregation would be entitled to relief, and that school boards must take steps "insofar as reasonably feasible" to alleviate racial imbalance regardless of its cause. *Jackson,* 59 Cal.2d at 881, 882, 31 Cal.Rptr. at 609, 610, 382 P.2d at 881, 882. It is true that these dicta were strengthened and adopted as holding in *Crawford I* itself, but the plaintiffs could not have been assured of that result in advance. With only *Jackson* as authority, plaintiffs retained substantial incentive to prove de jure segregation to obtain the most certain and comprehensive relief. That incentive is reflected in plaintiffs' successful motion to preserve for trial the "bad faith" of the school board in "knowingly, deliberately and intentionally" following a course of action that "had the effect, and continues to have the effect, of maintaining and perpetuating a racially segregated and imbalanced school system." ER 4, Exh. 5. It is also reflected in the trial court's findings and conclusions regarding de jure segregation.

Even if we were to assume that the *Crawford* plaintiffs lacked the incentive fully to litigate the de jure claims prior to the passage of Proposition I, they had both the incentive and the opportunity to develop their case after that point. On November 15, 1979, 9 days after the passage of the Proposition, the Board sought relief from

the court's earlier orders requiring mandatory pupil reassignment and transportation. The Board posed the issues of the effect of the original findings and conclusions and of "[w]hat additional proceedings must occur before this Court can determine whether a violation of the Equal Protection Clause has occurred." The Board ended its argument with a statement that it wanted a hearing on the de jure issue.

Again on December 4, 1979, the Board stated that new evidence should be taken regarding violations of federal law if the court decided to reject the Board's all-voluntary plan. Plaintiffs responded on December 19, 1979, relying on the arguments that the 1970 findings were res judicata of de jure segregation, and that Proposition I was unconstitutional retroactive legislation that deprived plaintiffs of their vested rights in the prior judgment. Plaintiffs contended that, until the constitutionality of Proposition I was established, there was no need to discuss the contention that the 1970 findings did not establish a federal constitutional violation. If it became necessary to discuss the Board's contention after that, then plaintiffs would "ask leave of Court for the opportunity to so do."

The trial court then ruled that federal constitutional violations had already been established, but the Court of Appeal reversed in *Crawford II*. We will discuss the exact scope of that decision in a moment. But at the least it held that the 1970 findings did not establish de jure segregation in violation of the Fourteenth Amendment. If that decision was erroneous, the remedy was appeal. The plaintiffs sought review in the Supreme Court of California, which denied review. In opposing review by that Court, the Board argued that the case was in a posture where the trial court could "conduct a hearing on the

existence of any 14th Amendment violation and its segregative effects" and could issue an order that would subsequently present the case for complete appellate review.

Upon being denied a hearing by the Supreme Court of California, the *Crawford* plaintiffs petitioned for certiorari in the Supreme Court of the United States, but only as to the ruling of the Court of Appeal that Proposition I was constitutional. The Supreme Court granted review and upheld Proposition I. *Crawford v. Board of Education,* 458 U.S. at 527, 102 S.Ct. at 3211.

Meanwhile, the remittitur of the Court of Appeal had been filed on March 12, 1981, one day after the Supreme Court of California denied review. The remittitur recited from the *Crawford II* judgment of December 19, 1980: "[T]he matter is remanded to the trial court for further proceedings consistent with this opinion. It is not our intent to disrupt the operation of the schools during the present semester. Since our decision will not become final for thirty days, the parties have ample time to take whatever legal action they think desirable prior to the commencement of the next school semester."

As we read the opinion in *Crawford II* and the remittitur, they did not foreclose plaintiffs from reopening and further litigating the issue of de jure segregation framed by the pleadings. The remittitur itself refers to additional legal action by the parties. It also requires, however, further "proceedings consistent with" the opinion in *Crawford II.* Certainly the opinion contains no express direction limiting the nature of proceedings on remand. The question, then, is whether the opinion establishes law of the case that would be inconsistent with a reopening of the de jure issue on remand. *See Puritan Leasing Co. v. Superior Court,* 76 Cal.App.3d 140, 147-48, 142 Cal.Rptr. 676, 680 (1977); 6 Witkin, *supra,* Appeal § 556. We think

that when the opinion is fairly read as a whole, it does not do so. It is true that at one point the Court of Appeal concludes, in a manner that would appear to preclude further litigation of the issue, that the racial imbalance in the Los Angeles schools that was the subject of Judge Gitelson's 1970 findings was not de jure in origin.[13] But we do not read this comment as a conclusion that plaintiffs could not produce evidence that the segregation was de jure; it is only a conclusion that they had not yet done so. The rest of the opinion supports our interpretation. The court merely reviewed the trial court's findings and held that as a matter of law they did not support the trial judge's conclusion of de jure segregation as that term was defined by the most recent Supreme Court decisions.[14] Merely because the appellate court found the evidence at the original trial insufficient to support the judgment

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[13]"From the foregoing recital of the cause and of the United States Supreme Court desegregation decisions we conclude that the racial imbalance and segregation which existed in many schools in the District and the Board's actions in relation thereto did not constitute a violation of the Fourteenth Amendment as interpreted by the United States Supreme Court in that racial imbalance and segregation did not result from Board acts performed with segregative intent and discriminatory purpose." *Crawford II,* 113 Cal.App.3d, at 650, 170 Cal.Rptr. at 506.

[14]"In sum, no federal violation of law was established by the 1970 findings, and the trial court's identification of the then existing racial segregation within the Los Angeles school system as de jure segregation was true only in a Pickwickian sense, and was not true at all in the sense of federal law. Because there was no evidence of acts done with specific segregative intent and discriminatory purpose, there was no federal constitutional violation—regardless of the terminology of the court." *Crawford II,* 113 Cal.App.3d at 647, 170 Cal.Rptr. at 504. *See generally id.* at 645-47, 170 Cal.Rptr. at 503-04.

does not generally foreclose retrial on remand.[15] *See* 6 Witkin, *supra,* Appeal § 548. Moreover, if the trial court had any doubt as to the nature of the appellate court's directions, it had to resolve it in favor of granting the plaintiffs a retrial. *Id.* at § 552; *see also Puritan Leasing,* 767 Cal.App.3d at 148, 141 Cal.Rptr. at 680.

We conclude, therefore, that the decision and remittitur in *Crawford II* did not foreclose further litigation of the issue of de jure segregation in the trial court. Plaintiffs here have not seriously contended otherwise. Indeed, in the district court they argued that the *Crawford* decision was not final because the remand left the door to further litigation open, a contention that was accepted by the district court. Moreover, the behavior of the *Crawford* plaintiffs throughout the period following remand, and the behavior of the Board until virtually the closing moment of the litigation, reflected an understanding that the de jure issue was still subject to reopening.

After the remittitur, the defendant Board adopted a resolution ending all mandatory aspects of its previous desegregation plan. Plaintiffs moved the state court on March 26, 1981, to enjoin implementation of that resolution on the ground that it was an affirmative act of intentional segregation in violation of the mandates of *Crawford I* and *II* and of orders of the trial court.

On March 31, 1981, the Board filed a memorandum noting the issues remaining for decision after remittitur. It stated that the Board was advised by plaintiffs that

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[15]Such a finding does have some significance, however. If, for example, there were a retrial and the evidence at the retrial was substantially the same as that at the original trial, the former decision would be the law of the case. *Stromer v. Browning,* 268 Cal.App.2d 513, 521, 74 Cal.Rptr. 155, 160 (1968).

plaintiffs wished to initiate proceedings in the trial court to establish that the District had engaged in acts of de jure segregation in violation of the Fourteenth Amendment.

On April 8, 1981, the trial court held a hearing on plaintiffs' motion for an injunction against implementation of the Board's resolution of March 16, 1981, ending mandatory desegregation measures. The motion was denied, and plaintiffs appealed to the Court of Appeal.

On April 15, 1981, while that state appeal was pending, plaintiffs filed the present action in federal district court. Plaintiffs sought and obtained a temporary restraining order from the district court restraining the District from implementing its March 16, 1981 resolution. In arguing in favor of the TRO, plaintiffs asked the district court to take judicial notice of the 1970 *Crawford* state court findings of de jure segregation, contending that those findings left little doubt that plaintiffs would succeed on the merits of their federal de jure claim.

At this point the posture of the two sets of plaintiffs, who are identical for purposes of res judicata, was that they were litigating the constitutionality, in light of the 1970 findings, of the Board's modification of its desegregation plan—the Board's resolution of March 16, 1981—in both state and federal court. There is no rule that prohibits them from doing so. There is a rule, however, that when one of the two courts enters a judgment that becomes final, it will have a preclusive effect on the other proceeding. *See Ruben v. City of Los Angeles,* 51 Cal.2d 857, 861 n. 1, 337 P.2d 825, 827 n. 1 (1959). Plaintiffs should not be surprised to have that rule invoked here.

This court subsequently vacated the TRO granted by the district court. *Los Angeles Unified School District v.*

United States District Court, 650 F.2d 1004 (1981). Proceedings then continued in state court. On May 4, 1981, the Crawford plaintiffs filed a statement of issues that referred to the de jure issue only in a footnote:

> Petitioners believe that an appropriate plan can and should be ordered under the existing mandate and provisions of the United States and California Constitutions. Should courts hold otherwise, a hearing in this court to prove de jure liability may become necessary.

That hearing was never requested. In subsequent proceedings the plaintiffs urged the court to implement its own desegregation plan using nonvoluntary approaches of pairing, clustering, adjusting feeder patterns and reorganizing grades. The court adopted the Board's plan, however, with minor changes. Ultimately all appeals were abandoned and the order of September 10, 1981, terminating the case on the merits became final.

On May 4, 1981, the same day that the plaintiffs had filed their last footnote mention of the possibility of requesting a hearing to prove de jure liability, the Board submitted a memorandum which for the first time took the position that the mandate of *Crawford II* precluded such a hearing. Obviously, that does not appear to have been the position of the plaintiffs, just as it had previously not been the position of the Board. The plaintiffs nevertheless let the matter of reopening the original de jure case drop. In addressing the issue of the relief to which they were entitled, plaintiffs had vigorously and fully litigated the issue of whether Proposition I was itself an act of de jure segregation. In further pursuing their relief after the remittitur in *Crawford II,* they had vigorously litigated the question whether the Board's resolution of March 16, 1981, abandoning mandatory desegregation

measures was an act of de jure segregation. Yet they never attempted to reopen their original de jure claim despite the Board's repeated earlier suggestions and their own stated awareness of the possibility.

Plaintiffs may have foregone their opportunity in *Crawford* because they hoped to accomplish their goals by urging other desegregation approaches on the state court. Or they may have chosen to pursue their original de jure claim in a federal forum that they perceived as being more receptive. The record contains some support for either surmise, but it makes no difference. The de jure issue was originally litigated; it could have been reopened in a later stage of the proceedings when the incentive to pursue it was greater. Plaintiffs cannot simply move to federal court and start anew. *See Allen v. McCurry,* 449 U.S. 90, 104-05, 101 S.Ct. 411, 420-21, 66 L.Ed.2d 308 (1980).

There is no manifest injustice in denying plaintiffs the opportunity to relitigate a part of a claim when they had a previous opportunity to do so but elected against it. *Stuart v. Real Estate,* 148 Cal.App.3d 1, 195 Cal.Rptr. 524, 526 (1983). The opportunities plaintiffs were afforded in the state proceedings both before and after the passage of Proposition I amply satisfy the requirements of due process. There is accordingly no constitutional barrier to our giving full faith and credit to the *Crawford* judgment. *See Kremer v. Chemical Construction Corp.* 456 U.S. 461, 480-82, 102 S.Ct. 1883, 1896-98, 72 L.Ed.2d 262 (1982). Nor, finally, has there been any change in the basic federal law of de jure segregation that would justify relaxation of the rule of claim preclusion. *See Bronson v. Board of Education,* 687 F.2d 836, 841 (6th Cir.1982).

There most certainly has been no change since *Crawford* closed.[16]

IV.

CONCLUSION

The order of the district court denying claim preclusive effect to the *Crawford* judgment is REVERSED.[17] The case is REMANDED to the district court for further proceedings consistent with this opinion.

BROWNING, PREGERSON, NELSON, BOOCHEVER and NORRIS, Circuit Judges, concur.

SNEED, Circuit Judge, concurring in part and dissenting in part; Choy, Wallace and J. Blaine Anderson, Circuit Judges, joining.

I concur with the majority that the doctrine of *res judicata* bars relitigation in this action of any claim that the Los Angeles School Board committed acts of *de jure* segregation prior to the conclusion of the state court trial in 1969.

However, I dissent in part because I believe that the preclusive effect of *res judicata* is greater. It also extends to alleged segregative acts that occurred after the original trial but prior to the entry of the state court's final order in 1981.

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[16] Under California law a change in the law following the original judgment is not a ground justifying relief from the doctrine of res judicata. *Slater v. Blackwood*, 15 Cal.3d at 796, 126 Cal.Rptr. at 227, 543 P.2d at 595.

[17] Because we conclude that plaintiffs are barrded by the claim preclusive effects of the *Crawford* judgment, we do not reach any issues of collateral estoppel (issue preclusion).

My position rests on the proposition that the amendment of the California Constitution by Proposition I explicitly put all alleged segregative acts at issue in the state court proceedings. The state court, as a result of the *Crawford* plaintiffs' lawsuit, had responsibility for supervising the implementation of a desegregation plan for the Los Angeles Schools. The *Crawford* plaintiffs, for their part, were required to bring before that court any allegations, such as post-1969 segregative acts, that would have affected the scope of that plan. Having kept their silence in the state court, representatives of the same class are not free to bring in federal court an action, based on allegations that could have been, but were not, raised in the state court, to set aside the plan approved by the state court and to order development of a new one.

In support of this conclusion, it should be recalled that in 1976, on appeal of an action brought by the plaintiff class, the Supreme Court of California charged the Superior Court of Los Angeles County with the responsibility to "exercise broad equitable powers in supervising the preparation and implementation of a reasonably feasible desegregation plan" for the Los Angeles school system. *Crawford v. Board of Education,* 17 Cal.3d 280, 308, 130 Cal.Rptr. 724, 743, 551 P.2d 28, 47 (1976). The Superior Court, with the active participation of the *Crawford* plaintiffs, was still engaged in executing that responsibility when the California Constitution was amended by Proposition I in 1979. The amendment, in combination with decisions of the United States Supreme Court, had the effect of conditioning certain of the equitable power of the court—namely, the power to order reassignment and/or transportation of students—on a finding of *de jure* segregation.

The majority acknowledges that the plaintiffs did, in the Superior Court proceedings in 1979 and 1981, have a full and fair opportunity, as well as ample incentive, to allege and prove acts of *de jure* segregation, done at *any* time in the past, that would have justified a busing order. But the majority, nonetheless, concludes that the *Crawford* plaintiffs were under a duty to take advantage of that opportunity only with respect to segregative acts that occurred prior to the close of the original trial in 1969. I strongly disagree. The majority's application of the doctrine of *res judicata* ignores both the realities of this case and the unique nature of school desegregation actions.

In this case, as well as in school desegregation cases generally, there is only one right at issue: the right of the plaintiffs to a desegregated school system.[1] In this case, the decree of the Superior Court, entered on September 10, 1981, was designed to vindicate that right. It was not designed merely to nullify, or to compensate for, particular acts of segregation that occurred prior to the 1969 trial. Nor was it designed to remedy the segregated condition of the Los Angeles school system as it existed at the close of trial in 1969. Rather, it incorporated those steps deemed necessary, in light of *the conditions that existed at the time the decree was entered,* to achieve desegregation of the school system. It was addressed to *"present conditions." Crawford v. Board of Education,* No. 822 854, Order Re Final Approval of School Board Desegregation Plan and Discharge of Writ of Mandate at 7 (Super.Ct. L.A. County, Sept. 10, 1981) (emphasis in original).

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[1] The majority rests its conclusion on the proposition that the doctrine of *res judicata* does not apply to "new rights acquired pending the action."

Acts of *de jure* segregation by the Los Angeles School Board between 1969 and 1981, were such to exist, would not create new and distinct rights. Any decree addressed thereto would serve the same function as did the Superior Court's order, namely, the *contemporary* desegregation of the Los Angeles school system. Any such acts would, however, expand the range of equitable powers that the Superior Court could invoke in fashioning its decree. Presumably the plaintiffs would have desired the invocation of those powers. Between 1969 and 1981 they had the opportunity and incentive to allege any *de jure* segregative acts of that period that would have made the additional remedies available. It is unreasonable to permit the plaintiffs to bring their allegations of *de jure* segregation since 1969 in another action in another court rather than presenting them to the Superior Court.

The majority's limitation of the *res judicata* effect of the state court action relies on the formal rule that "[t]he scope of the litigation is framed by the complaint at the time it is filed." This rule is quite suitable when applied to ordinary tort or contract cases. But even the majority does not strictly apply the rule to this case. Were it so applied, the *res judicata* effect of the state court action would extend only to segregative acts that occurred before 1963. Quite correctly, the majority rejects such a narrow approach. Instead, the majority construes a stipulation between the parties as a supplemental pleading that extended the scope of the litigation through the time of trial. The majority's problem is that it failed to follow through with this sound approach. The California Constitution requires that the "Application for Modification of Orders," filed by the school board following the passage of Proposition I in 1979, be construed as a supplemental pleading that put at issue the question of whether any acts of *de jure* segregation occurred up until the final

disposition of that motion. The California Constitution, as amended by Proposition I, provides that, upon such an application, any desegregation order, *"whenever rendered,* . . . shall . . . be modified to conform to the provisions of [Proposition I], *as applied to the facts which exist at the time of such modification."* Cal. Const. art. 1, § 7(a) (emphasis added).

The board's motion reflected the terms of Proposition I. It asked the court to determine "[w]hether this Court, *applying the facts as they exist today,* could properly determine that the Board had violated the Equal Protection Clause of the 14th Amendment." *Crawford v. Board of Education,* No. 822 854, Application for Modification of Orders at 3-4 (Super.Ct. L.A. County, Nov. 15, 1979) (emphasis added). The Application asked the court to "hold a hearing to determine whether a federal court, *sitting today,* would find a *de jure* violation and impose a remedy involving pupil school assignment or pupil transportation" *Id.* at 4 (emphasis added).

The board's application and its request for a hearing was clearly an invitation for the plaintiffs to come forward with whatever evidence existed of *de jure* segregation in the decade since the original trial. The invitation was declined. The board's interest in settling the issue once and for all, so that it could proceed to implement a desegregation plan that satisfied all constitutional requirements, state and federal, should not be permitted to be frustrated by the plaintiffs' unilateral decision.

To permit, as would the majority, another action in another court alleging acts of segregation between 1969 and 1981 that could have been, but were not, alleged in the state court action, woudl seriously undermine the efforts of the state court, the school board, and all the participants in the state court proceedings, to find a

stable and lasting solution to the problem of racial segregation in the Los Angeles school system. The school board has a right to expect that when, after eighteen years of litigation and struggle, the state court approves its desegregation plan and declares that the plan meets state and federal constitutional standards, that plan will not have to be immediately scrapped and a new one formulated as the result of a new lawsuit alleging acts that the plaintiffs could have alleged, but chose not to, in the state court proceedings. Similarly, the students, parents, and teachers of the school system have a right to some stability and continuity in the schools. As Judge Lopez stated in his final order approving the board's desegregation plan, "A case that involves the education of children must be resolved. There must be finality in the law so that people may plan their everyday lives to conform to the requirements of the law." *Crawford,* Order re Final Approval, *supra* at 2. School district resources at this time should be spent on education—and on integration—rather than on continuing litigation and relitigation.

The Superior Court's final judgment in no way insulates the school board from litigation over actions that it may have taken after the entry of that judgment or that it may take in the future. But the principle of *res judicata,* coupled with a realistic and practical approach to the unique problems of school desegregation cases, requires that the final approval of the board's desegregation plan bring an end to litigation over events that occurred prior to that approval.

These conclusions are consistent with California law, which, I acknowledge, governs the preclusive effect of the 1981 judgment. *See Migra v. Warren City School District Board of Education,* ____ U.S. ____, 104 S.CT. 892, 896, 79 L.Ed.2d 56 (1984). That law is properly reflected in

Eichman v. Fotomat Corp., 147 Cal.App.3d 1170, 197 Cal.Rptr. 612 (Ct.App. 1983). In *Eichman*, the plaintiff complained of injuries arising from a continuing relationship that was not terminated by the filing of the lawsuit. Following a judgment entered as the result of a settlement, a second suit was brought seeking additional relief with respect to alleged wrongs occurring before the judgment. The court held that "the judgment entered in the Eichmans' first suit bars any future recovery for acts committed by Fotomat before judgment was entered, but should Fotomat commit new wrongs, new suits may be brought." 147 Cal.App.3d at 1177, 197 Cal.Rptr. at 615. It recognized that a continuing wrong was terminated for purposes of claim preclusion only by judgment, not by the filing of the suit. Only after judgment did a new cause representing a distinct primary right come into being. *Accord Lord v. Garland*, 27 Cal.2d 840, 849, 168 P.2d 5, 11 (1946). Because of both the unique character of school desegregation cases in general and the special circumstances of this case, the date of judgment, for the purpose of applying the *Eichman* rule, must be the date of the state court's final order in 1981.

Kettelle v. Kettelle, 110 Cal.App. 310, 294 P. 453 (1930) is not to the contrary. It merely held that a tentative awarding of custody of a child to one parent in a suit for divorce did not preclude a second suit to determine the fitness of that parent to retain custody based on acts committed during the divorce trial. The court treated the custody issue raised by the second suit as a new right procedurally unrelated to the matter of divorce. *Id.* at 312, 294 P. at 454. The juridical relationship between the alleged pre- and post-1969 *de jure* segregative acts in this case, however, is plain and was never seriously questioned until now. These acts, had they been established, would have constituted but manifestations of a continuing

wrong, the correction of which would have been possible up to the date of final judgment in 1981. To deny this at this late date serves only to attempt to breathe life into a case more resembling at this time a desiccated corpse than a new born babe. The attempt to unnecessary, unwise, and misguided. I respectfully dissent.

PREGERSON, Circuit Judge, concurring; NELSON, Circuit Judge, joining:

I wholeheartedly concur with both the reasoning and result of Judge Canby's scholarly opinion and add these observations.

The court's opinion is an important milestone in the long struggle to achieve equality for the schoolchildren of Los Angeles.

Our decision gives plaintiffs the opportunity to prove that, after May 2, 1969, the school district intentionally discriminated against black pupils. Of course, the decision does not permit plaintiffs to establish that de jure segregation existed before this date. But nothing in our opinion prevents them from offering, for the purpose of shedding light on the school district's intent after May 2, 1969, evidence of de jure acts that occurred before then.

Fifteen years ago, Los Angeles Superior Court Judge Alfred Gitelson rendered his courageous decision finding that Los Angeles maintained a segregated school system. Six years ago, Los Angeles Superior Court Judge Paul Egly dedicated the remainder of his judicial career to fashioning a just and workable remedy. Somehow, their efforts were thwarted. But today, we have opened the doors to a United States Courthouse and made it possible for a federal district judge to address the vital social issues this case presents.

POOLE, Circuit Judge, concurring in part, dissenting in part.

I agree with the majority that the plaintiff "class" members cannot be barred by the doctrines of res judicata or issue preclusion from litigating the *de jure* issues of this case for the period following May 2, 1969. It is beyond dispute that both sides formally stipulated at the beginning of trial that they were going to try issues covering the period 1963 to 1968.

I disagree with the conclusion that in the aftermath of *Crawford v. Board of Education,* 113 Cal.App.3d 633, 643, 170 Cal.Rptr. 495 (1980), *(Crawford II),* the plaintiffs ever had that "full and fair opportunity" to relitigate their pre-1969 *de jure* claims as the majority charges. The time constraints and the unique circumstances of the last years of this case made quite illusory the possibility of any reopening in view of *Crawford II's* mandate pursuant to its heavy-handed treatment of the facts and principles believed long since established about the unacceptability of racial school segregation in California and about the State's consequent duty to bring it to an end.

Nor can I share the buoyant confidence expressed by some of my colleagues that today's decision promises any certainty of success in moving the bureaucracy for Los Angeles' school systems to repair the damage after years of neglect and indifference to the rights of all children to equal education. Still less do I anticipate that the mentality which put Proposition I on the lawbooks of this state has any real interest in making the accommodations needed to bring about the goal of quality education for all.

Therefore, with appreciation of the majority's conscientious efforts, I am moved toward this separate writing, for I do not see this as just another "school case." Rather, we may be at a watershed in public and political perception

of the constitutional principles of equal protection, and what happens to this case may furnish indicators of how fragile is the ground on which such principles rest.

Historical Observations

Some review of things past seems relevant to give appropriate context. In the century after the founding of California, and until the courts, federal and state, imposed constitutional restraints, there existed in this state attitudes, policies and practices of denying equal protection to certain citizens, of limiting freedom of mobility within the social community, of curtailing their legal and property rights, and of imposing differential treatment on account of race, color, and origin.

Before the turn of the century, when the railroads brought in large numbers of Chinese as laborers, they were traditionally and for many years restricted to living in the ghetto areas which became the Chinatowns of the west. When Japanese people began to arrive in large numbers at century's end, agitation developed throughout the western states to withhold agricultural lands from them because of the "competition" feared from their labor and industry. *See* McGovney, *The Anti-Japanese Land Laws of California and Ten Other States,* 35 Cal.L.Rev. 7, 14 (1945). In 1913, by legislation, and more strictly in 1920, by the Initiative Process, California adopted the Alien Land Law (Alien Property Initiative Act of 1920, Stats.1921, p. lxxxiii, as amended; 1 Deering's Gen.Laws, Act 261), which forbade aliens, most particularly Asians, from owning real property, or from leasing it for more than three years. The courts of California upheld this law and enforced it by injunctions and forfeiture proceedings until the Supreme Court held that the legislation violated

the Equal Protection Clause of the United States Constitution. *Oyama v. California,* 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948).

The good people of California brought to state-of-art usage the device of racially restrictive covenants, which forbade altogether the ownership, and even its occupancy (except for servants), of residential property by "any person not of the Caucasian race." California courts, at all levels, had a long history of upholding and vigorously enforcing these agreements by injunctions and suits for damages. The real estate industry exploited the exclusivity of existing covenants to boost sales and encouraged the filing of new restrictions. In practical and wide effect desirable residential areas became virtually unavailable with some exceptions, to nonwhites, because of the breadth of coverage of the covenants which generally provided that

> neither said premises, nor any part thereof, shall be used in any manner whatever or occupied by any Negro, Chinese, Japanese, Hindu, Armenian, Asiatic, or native of the Turkish empire, or descendant of the above named persons, provided, however, that such a person may be employed by a resident upon said property as a servant for such resident.

McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 Cal.L.Rev. 5, 15 (1945).

Not only were nonwhite persons barred from desirable areas by the existence of covenants but even where no restrictions actually ran with the land, local boards realtors, by custom and practice, and by so-called "codes of ethics," bound themselves not to show or sell properties

in "white" neighborhoods to nonwhites. Thus were created barriers restricting where people could live, enjoy their lives, and raise their families. In large measure, this is how racial minorities came to be where they were when this case was filed.

In the same year the Supreme Court decided the *Oyama* case, it also decided in *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), that when the California courts enforced racial restrictive covenants by way of injunction, that amounted to "state action" by California, and that such enforcement violated the equal protection clause of the Fourteenth Amendment. Next, in *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), the Court for the same reason held that state courts could nto allow covenantors to sue for damages for breaches of those agreements. However, by then, many residential patterns had already been fixed and the exclusion of nonwhites from residential areas was widespread and very effective.

In the intervening years, in Los Angeles and elsewhere generations of children had been assigned to schools in neighborhoods whose locations and constituent populations were shaped and maintained by discriminatory residential housing practices. Nor was this merely the accident of place and preference, for many forces combined to create segregation: state and city authorities, school boards, legislatures, businesses and public and private institutions all had some hand in the perpetuation of housing patterns. Consequently, this also affected school patterns, and the complexion of the public schools. Decisions about where schools would be built or maintained, the direction and sources of feeder patterns, the configuration of district boundaries, the planning of public transportation, and, above all, the public attitude

about the role of schools in the neighborhoods, set in motion currents which ebbed and flowed, became eventually the focus of public debate, and then the subject of litigation.

Pre-Crawford Litigation

Progenitor to all modern school segregation cases is *Brown v. Board of Education of Topeka, Shawnee County, Kansas, et al.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*"Brown I"*). There Chief Justice Earl Warren and the Court discarded the "separate but equal" rationale of *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), a doctrine which had for generations furnished justification for racial segregation in public facilities. The Court made a very simple statement. It said:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Brown I, 347 U.S. at 495, 74 S.Ct. at 692.

The Court invited submissions from the parties as to the form of relief to implement "the fundamental principle that racial discrimination in public education is unconstitutional." *Id.* at 495-496, 74 S.Ct. at 692-693. A year later, May 31, 1955, having considered the complex judicial administration concerns implicit in its decision, the Court issued a final order.

> the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases. (Emphasis supplied.)

Brown v. Board of Education of Topeka, Kansas, 349 U.S. 294, 301, 75 S.Ct. 753, 757, 99 L.Ed. 1083 (1955) (*"Brown II"*) (emphasis supplied).

The performance did not match the mandate. Litigation did not bring the solution. Litigation continued.

Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963)

Prior to 1961, the City of Pasadena in Los Angeles County contained several junior high school zones, Washington, McKinley and Eliot, into which various elementary school districts served as feeders. Linda Vista elementary school district had formerly fed into a fourth junior high school zone which withdrew from the Pasadena district. It then became necessary to determine where the Linda Vista pupils, all of them white, would be sent. Some parents feared their children might be required to attend Washington, whose enrollment was predominantly of Negroes and members of other minority groups. The parents threatened to seek withdrawal from the Pasadena district were this done. Although Washington was geographically nearer, the school board adopted new boundaries putting Linda Vista in the McKinley zone. The boundary changes permitted most white pupils to avoid attending schools with a high proportion of Negroes, while relegating Negro pupils to a single school.

Jackson, a black student, requested leave to transfer to the Eliot zone which was more convenient to his home

than Washington. When his request was denied, he sued. The board's demurrer was sustained. The California Supreme Court reversed. Chief Justice Gibson said for his unanimous court:

> The boundaries of school zones are normally fixed on a neighborhood basis, and where racial imbalance exists in California schools it is usually caused by the fact that the Negro population tends to concentrate in certain areas due to economic factors and discrimination in housing. * * * A racial imbalance may be created or intensified in a particular school not only requiring Negroes to attend but also by providing different schools for white students, who, because of proximity or convenience, would be required to attend it if boundaries were fixed on a nonracial basis.

Jackson, 59 Cal.2d at 881, 31 Cal.Rptr. at 609, 382 P.2d at 881. The court laid down a guiding principle concerning the duty and obligation of boards of education in California.

> So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as

> reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.

Id., 59 Cal.2d at 881, 31 Cal.Rptr. at 609-610, 382 P.2d at 881-882. This principle stood as the law until 1979 when the voters opted, by Proposition I, to make it hard to undo the effects of decades of institutionalized discrimination.

The Crawford Litigation

It is of historical fact that the Supreme Court's charge in the two *Brown* cases, that there be "all deliberate speed" in the elimination of segregated schools, has always encountered strong resistance. So also did Chief Justice Gibson's ringing declaration in *Jackson* meet with stubborn opposition in California. In 1963, shortly after *Jackson* was decided, the *Crawford* suit was filed in Superior Court against the Los Angeles Unified School District to compel its board to prepare and implement a master plan for the eventual desegregation of the district. The course of that effort has been well chronicled in Judge Canby's majority opinion and I shall not repeat it here. It is enough for this purpose that valiant efforts were made to persuade the District to do voluntarily what the United States Supreme Court and the California Supreme Court had held was its bounden duty.

When persuasion failed, even though the litigation was several times recessed to pursue settlement, trial commenced in October 1968. After some 65 court days, it concluded in May 1969 in a judgment in favor of the plaintiffs. The court issued a writ of mandate to compel the District to submit and to implement a "meaningful desegregation plan" which would "realistically work within a reasonable period of time, having for its aim, purpose and object a racially nondiscriminatory unitary

school system * * *." The District appealed. The California Court of Appeal, Second District, reversed, rejecting Judge Gitelson's findings of the existence of systemic and systematic policies of racial segregation. *Crawford v. Board of Education of the City of Los Angeles,* 120 Cal.Rptr. 334, *vacated,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976). The California Supreme Court granted hearing.

In *Crawford v. Board of Education of the City of Los Angeles,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976), the Supreme Court vacated the intermediate appellate court's judgment of reversal. It affirmed the trial court's judgment issuing the writ of mandate. The opinion reviewed the Superior Court's detailed findings, including the finding that the board

> "has * * * since at least May of 1963, knowingly, affirmatively and in bad faith * * * by and through its affirmative policies * * * and practices, * * * segregated, *de jure,* its students. * * *"

Justice Tobriner then further held:

> The [trial] court based this finding on a number of affirmative actions which the board had taken over the relevant period with the knowledge that such acts would create and perpetuate segregated education within their district.

Id., 17 Cal.3d at 288, 130 Cal.Rptr. at 728, 551 P.2d at 32. In my judgment this is an important decision upholding the trial judge's finding of fact. Its significance appears later.

In sustaining the finding that segregation of the Los Angeles School District was *de jure* in nature, the court found it unnecessary to place its specific imprimatur on a resolution of the *de jure/de facto* terminology. It had

already held 13 years previously in *Jackson* that affixing such a label was unnecessary, since under any appellation, the evil was the same and had to be exorcised. But, because four years later in *Crawford II* (1980) the same intermediate appellate court whose reversal of Judge Gitelson's decision was itself reversed and vacated, rewrote history and denied that the *de jure* finding was valid, I set forth here Justice Tobriner's exact language in *Crawford I:*

> The defendant school board appeals from the trial court judgment, contending primarily that the segregated condition of its district's schools should properly be characterized as "de facto" rather than "de jure" and that it owes no constitutional duty to alleviate such de facto school segregation. *The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature.* We shall explain, however, that we do not rest our decision on this characterization because we continue to adhere to our conclusion in *Jackson* tht school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation "regardless of its cause." (59 Cal.2d at p. 881, 31 Cal.Rptr. 606, 282 P.2d 878). Consequently, the trial court's finding that the schools in the Los Angeles Unified School District are segregated, together with its conclusion that the defendant school board has failed to undertake reasonably feasible steps to desegregate its schools, are sufficient to sustain the trial court's order compelling the school board to prepare and implement a plan which attempts to alleviate the segregation and the traditional harmful effects of segregation in its district's schools.

17 Cal.3d at 285, 130 Cal.Rptr. at 726, 551 P.2d at 30 (emphasis added). Later the opinion detailed references to the bases on which the trial court had reached that conclusion.

Crawford II

As the majority opinion sets forth, following the affirmance by the California Supreme Court, in *Crawford I*, the case was remanded to the Superior Court for further proceedings.

The following is a chronology of subsequent proceedings:

October 3, 1977, the Board submitted its Plan II. The Plan involved pairing and clustering of some minority and white schools in grades four to eight, only, including mandatory re-assignment of some students.

September 12, 1978, Plan II went into effect for the school years 1978-79. Trial to determine the sufficiency of the Plan was set for June 4, 1979, and then continued to October, 1979.

October 17, 1979, Board asked leave to withdraw all mandatory aspects of Plan II, and to substitute an all-voluntary plan.

October 22, 1979, trial began on sufficiency of Plan II and of the proposed all-voluntary plan.

November 6, 1979, Proposition I was approved, amending California Constitution's Due Process and Equal Protection provisions, and providing that

> [N]othing * * * [in the California Constitution] imposes upon [the State, any official public entity, or board], any obligations or responsibilities which exceed those imposed by the Equal Protection Clause

> of the Fourteenth Amendment * * * with respect to the use of pupil school assignment or pupil transportation. * * * [N]o court of this state may [require] pupil school assignment or pupil transportation, (1) except to remedy a specific violation that would also [violate the Fourteenth Amendment], and (2) unless a federal court * * * would be permitted * * * to [require such remedy under the Fourteenth Amendment].

November 15, 1979, the Board applied for modification of the court's orders of May 7, 1978, and May 30, 1979, which had required mandatory reassignment. The Board argued that there had been no *de jure* violations under federal law, that Judge Gitelson's findings to that effect did not support such a conclusion, and that they were not res judicata or law of the case. There is no transcript of the argument. Both sides submitted briefs. In their Memorandum of Law, plaintiffs argued that there had indeed been findings of *de jure* segregation, which findings were final; that res judicata applied; and that the Board had not established that Proposition I was constitutional.

January 21, 1980, the Board filed a memorandum about the constitutionality of Proposition I. It argued that the trial court's finding of *de jure* segregation was dictum, hence not necessary to the judgment, and not res judicata.

April 23, 1980, plaintiffs filed replies. They argued that the *de jure* issues had been pleaded, argued, and decided in their favor.

May 19, 1980, Judge Egly denied the application for modification. He held that Judge Gitelson's 1970 finding was that the segregation was *de jure.* Hence he found it

unnecessary to consider Proposition I because "the mandate here requires the same result as would be required under Federal decisional law."

July 7, 1980, Judge Egly filed findings of fact and conclusions of law. He ordered the Board to adopt a plan devised by the court providing for mandatory pairing and clustering of 144 elementary and 9 junior high schools, for magnet schools, for mandatory transportation and reassignment.

July 10, 1980, the Board appealed the orders of May 19 and July 7, 1980.

December 19, 1980, the California Court of Appeal filed its decision vacating Judge Egly's orders of May 19, 1980 and July 7, 1980. *Crawford v. Board of Education of the City of Los Angeles,* 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) (*Crawford II*).

Full and Fair Opportunity for Relitigating the Issues of De Jure Segregation

I am convinced that when *Crawford II* is read closely along with its mandate and with the subsequent history of this case there was no full and fair opportunity realistically open to the plaintiffs to reinstate litigation of the *de jure* issues.

The California Court of Appeal went about the appeal before it with the obvious determination to get rid of the busing program ordered by the Superior Court and to uphold Proposition I. That court had tried to reverse Judge Gitelson's orders when the case was first before it in 1975. Indeed, it had in fact rendered an opinion reversing the judgment (120 Cal.Rptr. 334), which the California Supreme Court unanimously vacated. In 1980 the Court of Appeal got a second chance. The *Crawford II*

opinion rejected or found insignificant the factual findings made by the trial court. It disputed the materiality of the trial evidence that the Board had manipulated neighborhood schools, attendance areas, and boundaries, so as not only to impact existing segregation of schools, but to increase and worsen that impact; that it had adopted transfer and transportation policies which it knew could not cope with the immensity of the problems and the distances involved in the administration of the Los Angeles School District; that in respect of the allocation or withholding of funds, the selection of plant sites, assignment of teachers, and in dealing with such things as curriculum imbalances, the Board had, in the trial court's opinion of the facts, pursued conduct which a qualified educator must surely have known would discriminatorily impact against racial minorities. *See Crawford II,* 113 Cal.App.3d 642-643, 170 Cal.Rptr. at 501-502.

The trial court found that the patterns of the Board's conduct were not random or neutral, but were executed with a design to keep things as they were. The appellate court seized upon the absence of a discrete finding that there existed "a policy or program which denied admission to any school or required attendance at any school on the basis of race," or an articulated "gerrymandering of attendance zones to create or preserve segregated schools." *Id.* at 644, 170 Cal.Rptr. at 502. It concluded that *de jure* segregation existed "only in a Pickwickian sense, and was not true at all in the sense of federal law." *Id.* at 646, 170 Cal.Rptr. at 504.

Nowhere did the appellate court consider the Supreme Court's language in *Crawford I* that the findings "adequately support the trial court's conclusion that the segregation in the defendant school district is *de jure* in nature," as quoted above. But the point of this review is

not a critique of that court's dexterity with history nor its reading of its own Supreme Court's decisions. The point is that *Crawford II* undid the factual findings of the trial court and then, by its mandate interposed a time straitjacket which made it not feasible to ask the trial court on remand to reopen the *de jure* questions which had supposedly become final in 1976.

The mandate remanded the case to the trial court for further proceedings but only those consistent with the *Crawford II* opinion. It reads:

> The orders of May 19, 1980, and July 7, 1980, are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion. It is not our intent to disrupt the operation of the schools during the present semester. Since our decision will not become final for thirty days, the parties have ample time to take whatever legal action they think desirable prior to the commencement of the next school semester. Our previous orders dated August 6, 1980, staying certain features of the trial court's plan, are continued in force until further order of the court.

Id. at 656-657, 170 Cal.Rptr. at 510.

The legal action referred to could not be construed as meaning that counsel was free to persuade the trial court that the *Crawford II* court was wrong in holding that *de jure* segregation had not been proved. The mandate spoke to what the parties might do before the mandate came down—thirty days, unless, within that time the Supreme Court of California or the United States Supreme Court should issue a stay or grant hearing. The only steps the parties might take in the interim would be to apply for relief to a higher court prior to the commencement of the next school semester.

The plaintiffs did indeed seek hearing by the California Supreme Court but hearing was denied them on March 11, 1981, without opinion. The very next day, on March 12, 1981, the remittitur of the California Court of Appeal issued.

In the subsequent hearings, after jurisdiction had been revested in the trial court, there was no feasible way for the plaintiffs or the trial court, had it been so minded, to reopen the trial record. It had all been litigated, and the Court of Appeal had foreclosed any return to that phase.

Herewith is the closing history:

March 16, 1981, Board adopts resolution dropping all mandatory aspects of the October, 1980 Plan III.

March 26, 1981, plaintiffs moved to enjoin "dismantling" of Plan III.

April 8, 1981, hearing on motion by Judge David Eagledon, Judge Egly having now disqualified himself. Plaintiffs' motion is denied.

April 10, 1981, plaintiffs appeal denial of preliminary injunction.

April 14, 1981, California Court of Appeal denies application for temporary stay.

April 17, 1981, Judge Robert Lopez assigned to the case.

April 23, 1981, pre-trial conference held; continued to May 13, 1981.

May 4, 1981, Board files Statement Present of Status of the Case. Board contends that further litigation of *de jure* issues is precluded by the decision in *Crawford II* because it has held that there was no *de jure* segregation.

June 15, 1981, plaintiffs applied for TRO and preliminary injunction against continuing year-round schedules in the minority segregated schools, or placing any additional minority segregated schools on year-round schedule.

June 17, 1981, TRO denied.

June 19, 1981, Board submits desegregation plan for 1981-1982 school year.

June 24, 1981, preliminary injunction denied. Court rules that trial on Board's desegregation plan shall be by written testimony only, and shall be submitted by August 12, 1981.

August 14, 1981, all pending matters ordered submitted on August 12, 1981.

September 10, 1981, court enters final approval of school board plan and orders discharge of writ of mandate; terminates jurisdiction except for determination of attorneys' fees.

October 21, 1981, plaintiffs appeal order of September 10.

November 25, 1981, court enters final order terminating jurisdiction after awarding attorneys' fees.

May 24, 1983, plaintiffs dismiss appeal from the September, 1981 order.

Final Conclusions

The *Crawford* litigation has had few parallels. The Supreme Court of the United States held that segregated public educational schools violate the Fourteenth Amendment.

Los Angeles maintained a public school system which was—and today is—racially segregated.

The plaintiffs sued to require Los Angeles Unified School District to adopt and implement a realistic plan for bringing about a unitary school system.

The plaintiffs won. The trial court found that Los Angeles had been maintaining a dual school system which discriminated against Black children and the children of other racial minorities.

The trial court ordered the school board to prepare for, make a plan for, and begin to bring about a desegregated school system.

The Supreme Court of California upheld the judgment and finding that Los Angeles' segregated system was *de jure* in nature, not merely ill from natural causes.

The trial court determined that segregation in Los Angeles schools was so pervasive and ingrained that only by the use of all measures, including pupil assigment and transportation could substantial relief be accomplished. It ordered a mandatory pupil assignment and transportation ("busing") plan into effect.

Resentment against busing and pupil assignment plans culminated in the passage of Proposition I, after one of the ugliest political campaigns in California history. That new law in effect forbade such school plans unless a district were found so deeply segregated as a command of state law, that is *de jure,* that the Fourteenth Amendment would require assignment and busing.

The trial judge held that the plaintiffs had pleaded and proved *de jure* segregation; the court had found *de jure* segregation and the Supreme Court had sustained that finding.

An intermediate appellate court ruled that there had never been *de jure* segregation, and that the trial court

could have found its existence only in a "Pickwickian" sense. It set aside the finding, and ordered the case restructured "consistent with" the new light. The finding was not "Pickwickian;" the suggestion is Rabelaisian.

The plaintiffs lost.

Indeed, this is a unique case, a case in which judges awarded victory to the lawful winners. And then the rule-makers changed the rules, and the other judges annulled the victory.

Some of our brothers emphasize the importance of respect for established rules of finality—of res judicata, of issue preclusion. It is ironic that the rules themselves were altered here to set aside that very principle of finality.

The plaintiffs lost their case, but the struggle they fought was neither vain and is not finished. To the extent the present majority decision may make possible another try, in part, I concur. From so much of this court's opinion as gives respect to what I believe to be disgraceful conduct by a great state, I respectfully dissent.

APPENDIX B

LOS ANGELES UNIFIED SCHOOL DISTRICT,
ET AL.,
DEFENDANTS-APPELLANTS,

v.

LOS ANGELES BRANCH NAACP,
ET AL.,
PLAINTIFFS-APPELLEES.

No. 81-5772.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 10, 1982.

Decided Sept. 1, 1983.

As Amended Nov. 16, 1983.

G. William Shea, Peter W. James, McCutchen, Black, Verleger & Shea, Los Angeles, Cal., for plaintiffs-appellees.

Thomas I. Atkins, Gen. Counsel, Brooklyn Heights, N.Y., for defendants-appellants.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS, SNEED and SKOPIL, Circuit Judges.

SNEED, Circuit Judge:

The NAACP brought this action against a group of state and local educational authorities, alleging unconstitutional segregation in the Los Angeles public schools. The three local defendants, the Los Angeles Unified School District, the Board of Education of the City of Los

Angeles, and the Superintendent of Schools,[1] moved for summary judgment on the ground that the present suit was barred by the adjudication of an identical claim before the Superior Court of Los Angeles County in *Crawford v. Board of Education,* (No. C822854).[2] The district court denied the motion, 518 F.Supp. 1053, and certified this interlocutory appeal. We reverse and remand for such further proceedings as are consistent with this opinion.

I.

FACTS

In 1963, the California Supreme Court held in a unanimous decision that school boards are under an obligation to remedy racial segregation in the public schools, regardless of the cause of such segregation. *Jackson v. Pasadena City School District,* 59 Cal.2d 876, 881, 382 P.2d 878, 881-82, 31 Cal.Rptr. 606, 609-10 (1963).

Soon thereafter, *Crawford* was filed as a class action on behalf of black school children in the Los Angeles Unified School District,[3] Seeking desegregation of the District's schools. After the failure of the District to formulate a satisfactory voluntary plan for desegregation, *Crawford* came to trial in 1968 in the Superior Court of Los Angeles County before Judge Alfred Gitelson. The parties agreed

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[1] We refer to the local defendants collectively as the District.

[2] The state defendants also moved for summary judgment on Eleventh Amendment and case or controversy grounds, and the district court granted their motions. 518 F.Supp. 1053, 1063-64. The NAACP has sought review of this decision separately from the present appeal.

[3] The *Crawford* class (*Crawford* plaintiffs) was expanded later to include Mexican-American children in the Los Angeles schools.

to limit the scope of the Court's inquiry into the District's activities to the period from May 1, 1963 to the beginning of trial. After considering an enormous body of evidence and holding a lengthy trial, Judge Gitelson rendered judgment for the plaintiff class on May 12, 1970. Judge Gitelson found that a number of the schools in the District were segregated, and concluded that the Board of Education had segregated its students *de jure* as the result of policies, practices, and omissions on the part of the Board.[4]

The Board of Education appealed to the California Supreme Court, which affirmed the judgment of the Superior Court, but only on the basis of the Board's failure to remedy racial segregation in the public schools, as was required under the California State Constitution by *Jackson. Crawford v. Board of Education,* 17 Cal.3d 280, 285, 551 P.2d 28, 30, 130 Cal.Rptr. 724, 726 (1976) (*Crawford I*). It did not rest its decision on the Superior Court's finding of *de jure* segregation, although it stated that such finding was supported by the record. *Id.*

On remand to the Superior Court, Judge Paul Egly held extensive hearings on the appropriate remedy, and ordered mandatory busing to begin in September 1978.[5] However, on November 6, 1979, the California voters enacted Proposition 1, which restricted the power of the state courts to order busing and pupil assignment as remedies for school segregation to that exercised by the federal courts under the Fourteenth Amendment. The effect of Proposition 1, therefore, was to overrule the part

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[4] See *Crawford v. Board of Education,* 113 Cal.App.3d 633, 642-44, 170 Cal.Rptr. 495, 501-02 (1980).

[5] Judge Gitelson was defeated in his bid for reelection to the Superior Court, and Judge Egly was assigned the case.

of *Jackson* and the cases following it which permitted court-ordered busing and pupil assignment as remedies for school segregation even in the absence of *de jure* segregation.

The *Crawford* defendants then petitioned to the Superior Court to end mandatory school busing in Los Angeles. The court denied the request, holding that Proposition 1 did not apply to Los Angeles, since Judge Gitelson's 1970 decision had found *de jure* segregation, a violation of the Fourteenth Amendment for which busing is an appropriate remedy.

In December 1980, the California Court of Appeal reversed, and vacated the order refusing to terminate the mandatory busing plan. *Crawford v. Board of Education*, 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) (*Crawford II*). The court, in the light of subsequent United States Supreme Court opinions and its construction of Judge Gitelson's 1970 decision, held that the *Crawford* plaintiffs had not established the existence of *de jure* segregation in the District, as is needed under the Fourteenth Amendment for busing to be used as a court-ordered remedy. *Id.* at 638-46, 170 Cal.Rptr. at 499-504,[6] Noting that the District was still obligated under California law, as explicated in *Jackson* and *Crawford I*, even after Proposition 1

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[6]As the Supreme Court has explained, a holding of *de jure* segregation must be based on a finding of purpose or intent to segregate, *Keyes v. School District No. 1*, 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973), while *de facto* segregation only requires proof of the existence of racial imbalance "in the schools but with no showing that this was brought about by discriminatory action of state authorities." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17-18, 91 S.Ct. 1267, 1276-77, 28 L.Ed.2d 554 (1971). The Court of Appeal in *Crawford* concluded that the District did not act with segregative intent and discriminatory purpose. 113 Cal.App.3d at 649, 170 Cal.Rptr. at 506.

to remedy racial segregation in the public schools — as long as mandatory busing or pupil assignment is not included in any desegregation plan — the court issued a remittitur to the Superior Court to formulate a desegregation plan consistent with the requirements of Proposition 1. *Id.* at 636-37 n. 1, 651, 170 Cal.Rptr. at 497-98 n. 1, 507; *see also Crawford v. Board of Education,* 458 U.S. 527, 535, 102 S.Ct. 3211, 3217 & n. 12, 73 L.Ed.2d 948 (1982).

On July 2, 1981, the Board submitted a desegregation plan to the Superior Court, Judge Robert Lopez now presiding.[7] Judge Lopez accepted the plan, with modifications, on September 10, 1981.[8] The court held that the desegregation plan remedied *present conditions* in the District, and that the plan protected the rights of all students and met constitutional standards. Order Re Final Approval of School Board Desegregation Plan and Discharge of Writ of Mandate at 7 (Superior Court of

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The Court of Appeal also upheld the constitutionality of Proposition 1. 113 Cal.App.3d at 650-56, 170 Cal.Rptr. at 506-10. Addressing this issue only, the Supreme Court affirmed the California appellate decision. *Crawford v. Board of Education,* 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982).

[7]Judge Egly recused himself from further participation in *Crawford.*

[8]Soon thereafter, United Teachers Los Angeles (UTLA), an intervenor since 1979, filed a "Notice of Motion and Motion for Clarification of Order re Final Approval of School Board Desegregation Plan and Discharge of Writ of Mandate; Declaration and Points and Authorities in Support Thereof." Judge Lopez held a hearing on October 30, 1981 and denied this motion. UTLA continues to challenge the District's implementation of the September 10, 1981 Order on the grounds that it did not require the District to violate its collective bargaining agreement with UTLA members. UTLA alternatively claims that if the order did require a breach of their agreement, the plan was not a reasonably feasible one as required under *Crawford II.*

Los Angeles County No. C822854) (September 10, 1981 Order).[9] The court stated that the "underlying issues [in *Crawford*] have been resolved," *id.* at 8, and, on November 25, 1981, awarded costs and attorneys' fees, and terminated jurisdiction.[10]

Meanwhile, on April 15, 1981, the NAACP filed the present case in the District Court for the Central District of California as a class action on behalf of black children eligible to attend the Los Angeles schools. The plaintiffs alleged unconstitutional segregation in the Los Angeles Unified School District from its establishment until the present, and sought a temporary restraining order to enjoin the termination of mandatory busing in the District. The district court granted the temporary restraining order on April 17, 1981, 513 F.Supp. 717, but we vacated the order the following day. 650 F.2d 1004 (9th Cir. 1981). On remand, the district court refused to grant the NAACP's motion for a preliminary injunction.

The District then moved for summary judgment on the ground that the doctrines of res judicata and collateral estoppel preclude this suit.[11] The district court denied the

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[9]Initially, the *Crawford* plaintiffs appealed the September 10, 1981 Order. The appeal was dismissed on May 24, 1983, however, pursuant to the *Crawford* plaintiffs' own motion. *Crawford v. Board of Education*, No. 2d Civil 66706 (Cal. Ct. App. May 24, 1983).

[10]The District appealed the award of attorneys' fees. The California Court of Appeal ruled that the attorneys' fees appeal would be briefed and considered after UTLA's appeal was resolved. *See Crawford v. Board of Education*, No. 2d Civil 67061 & 67532 (Cal. Ct. App. Jan. 28, 1983).

[11]The District also contended that the district court should abstain from deciding this case, since *Crawford* was still before the California courts. With the termination of state court jurisdiction over *Crawford* plaintiffs, however, the basis for invoking the abstention doctrine has

motion on July 16, 1981, but certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

II.

PRECLUSION OF THE DE JURE SEGREGATION CLAIM

The District asserts that the NAACP is precluded under the doctrines of res judicata and collateral estoppel from litigating its contention that the Los Angeles schools were segregated *de jure,* since that claim was adjudicated in *Crawford.* The district court under the circumstance it confronted refused to apply res judicata or collateral estoppel. We reverse.

As the Supreme Court explained in *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414-15, 66 L.Ed.2d 308 (1980):

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell v. County of Sac,* 94 U.S. 351, 352 [24 L.Ed. 195]. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first

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disappeared, and the parties agree that abstention is no longer an issue in this appeal. In addition, the District argued unsuccessfully that the NAACP is barred from raising its *de jure* claim here by the doctrine of virtual representation. 518 F.Supp. at 1060. Since we hold that res judicata and collateral estoppel preclude the present claim, we do not reach the virtual representation issue.

> cause. *Montana v. United States,* 440 U.S. 147, 153 [99 S.Ct. 970, 973, 59 L.Ed.2d 210] . . . . As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

In applying the requirements for res judicata and collateral estoppel, we are obligated by 28 U.S.C. § 1738 "to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982). We therefore must turn to the rules for preclusion followed by the courts of California. *See Miofsky v. Superior Court,* 703 F.2d 332, 336 (9th Cir. 1983).

A. *Res Judicata*

Under California law, the application of res judicata is dependent on the conclusion that: (1) there was a final judgment on the merits in the earlier proceeding; (2) the claims were part of a cause of action that was litigated and decided, or that might have been litigated, in the earlier proceeding; and (3) the parties against whom the principle is invoked were parties or in privity with a party to the prior adjudication. *See Dillard v. McKnight,* 34 Cal.2d 209, 214, 209 P.2d 387, 391 (1949); *Mattson v. Costa Mesa,* 106 Cal.App.3d 441, 446, 164 Cal.Rptr. 913, 916 (1980); *see also Sea-Land Services Inc. v. Gaudet,* 414 U.S. 573, 579, 94 S.Ct. 806, 812, 39 L.Ed.2d 9 (1974). We examine each of these requirements below.

1. *Final Judgment*

The district court, having before it only the remittitur from the California Court of Appeal, held that there was no final judgment on the merits in *Crawford*, and therefore refused to preclude litigation in the federal court of the NAACP's claim. 518 F.Supp. at 1058-59. However, as noted above, on September 10, 1981, the Superior Court of Los Angeles County approved a desegregation plan for the Los Angeles schools, and stated that all the underlying issues on *Crawford* have been resolved. It held, "After the balancing and reconciliation of many competing values, the Court finds that the Plan, as ordered changed by the Court, will protect the rights of all students and meet Constitutional standards. The time has come to end these proceedings." September 10, 1981 Order at 7. The *Crawford* plaintiffs' appeal of this order was dropped pursuant to their own motion.[12] Thus, the court's jurisdiction over

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[12]*See supra* note 9. Intervenor UTLA continues to challenge the implementation of the September 10, 1981 Order. *See supra* note 8. Under California law,

> [a]n appeal from a judgment by some of the defendants, although the notice of appeal is general in its terms, is of necessity an appeal from only that portion of the judgment which injuriously affects the appealing defendants, and is thus, in effect, an appeal from ... the portion or the judgment adverse to their interests, unless the reversal or modification of the whole judgment is essential to protect the interests of the appealing defendants.

Lake v. Superior Court, 187 Cal. 116, 119-20, 200 P. 1041, 1042 (1921). And, "the doctrine of res judicata applies to those portions of a judgment which have become final." *Moore v. Wood*, 26 Cal.2d 621, 629, 160 P.2d 772, 776 (1952). UTLA appeals only the interpretation of the plan, not the law established in the prior *Crawford* litigation. We see no reason to believe, and the parties have not contended, that UTLA's claim is not completely severable from the merits decided in

the *Crawford* plaintiffs ended, save for the determination of attorneys' fees. Moreover, on November 25, 1981, the Superior Court awarded fees and terminated all jurisdiction over the *Crawford* plaintiffs, observing as it did so, "There must be finality in the law." Final Order Terminating Jurisdiction at 16 (Superior Court of Los Angeles County No. C822854).[13] There is, therefore, now a final judgment on the merits in *Crawford.*

2. *Claims Litigated*

When there is a final judgment between the same parties or their privies, res judicata will preclude the maintenance of a second suit on the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action. *Olwell v. Hopkins,* 28 Cal.2d 147, 152, 168 P.2d 972, 975 (1946); *Mattson,* 106 Cal.App.3d at 446, 164 Cal.Rptr. at 916. For res judicata to preclude the present action, therefore, the NAACP's claim of *de jure* segregation in the Los Angeles schools must have been part of a cause of action that was actually litigated, or might have been litigated, in *Crawford.* We hold that this element of res judicata has been satisfied.

Crawford I and *Crawford II. See American Enterprise, Inc. v. Van Winkle,* 39 Cal.2d 210, 216-19, 246 P.2d 935, 938-40 (1952). UTLA's appeal, therefore, does not affect the finality of the *Crawford* plaintiffs' action for res judicata purposes.

[13]The District appeals the award of the attorneys' fees. Such an award is considered part of the determination of costs under California law, see *Folsom v. Butte County Assoc. of Governments,* 32 Cal.3d 668, 678, 186 Cal.Rptr. 589, 596, 652 P.2d 437, 444 (1982), and, this appeal does not affect the final judgment on the merits of the *Crawford* plaintiffs' litigation. *See Perry v. West Coast Bond & Mortgage Co.,* 136 Cal.App. 557, 559, 29 P.2d 279, 280 (1934). *See also Klinker v. Klinker,* 132 Cal.App.2d 687, 693, 283 P.2d 83, 87 (1955).

Initially we must demonstrate that the claim of the plaintiff class in *Crawford* was the same as that alleged by the present class in this case. Under California's "primary rights" theory of res judicata, a " 'cause of action' is based upon the harm suffered" by the plaintiff, and not upon the legal ground for relief, since even " where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." *Slater v. Blackwood,* 15 Cal.3d 791, 795, 543 P.2d 593, 594-95, 126 Cal.Rptr. 225, 226-27 (1975). In both *Crawford* and the present case, the harm alleged to have been suffered by the plaintiff class is the same — unconstitutional segregation of the Los Angeles schools. For this purpose it makes no difference that the cause might rest on both state and federal constitutional grounds. *See Boccardo v. Safeway Stores, Inc.,* 134 Cal.App.3d 1037, 1043, 1054, 184 Cal.Rptr. 903, 907, 914 (1982) (state and federal claims based on right to be free from economic injury caused by price fixing are part of same cause of action). Thus, *Crawford* and this case are part of the same cause of action.

Next, we must show that the claim of *de jure* segregation advanced in the present case was actually litigated, or might have been litigated, in *Crawford.* To do this a brief review of the California proceedings is necessary.

In his 1970 decision, Judge Gitelson held, inter alia, that there was *de jure* segregation in the Los Angeles Unified School District in violation of the Fourteenth Amendment. Findings of Fact and Conclusions of Law, at Conclusions 7-10 (Superior Court of Los Angeles County No. C822854 May 12, 1970). Numerous specific findings of fact demonstrate this. *E.g., id.* at Findings 1(c), 1(h), 38, 59, 82. The District appealed that holding to the California Supreme Court, which, while it declined to rest

its decision on *de jure* segregation, observed that Judge Gitelson's findings supported his conclusion. *Crawford I,* 17 Cal.3d at 285, 551 P.2d at 30, 130 Cal.Rptr. at 726. But in the second round of appeals of the 1970 judgment following the passage of Proposition 1, the California Court of Appeal in *Crawford II* reviewed the *de jure* claim, and reversed. The court held that Judge Gitelson had only found *de facto,* and not *de jure,* segregation, explaining:

> [W]e conclude that the racial imbalance and segregation which existed in many schools in the District and the Board's actions in relation thereto did not constitute a violation of the equal protection clause of the Fourteenth Amendment . . . in that racial imbalance and segregation did not result from Board acts performed with segregative intent and discriminatory purpose.

113 Cal.App.3d at 649, 170 Cal.Rptr. at 506. The Supreme Court of California declined to review the case. Thus, the *de jure* segregation claim was decided in *Crawford.*

The NAACP argues that for res judicata to apply, the claim of *de jure* segregation not only must have been decided in *Crawford,* it must also have been properly litigated there. According to the NAACP, the *Crawford* plaintiffs, relying on *Jackson,* planned their argument and presentation of evidence before the Superior Court to establish the existence of *de facto* segregation, and the finding of *de jure* segregation was the reaction of Judge Gitelson *sua sponte* to the evidence. In addition, the NAACP contends that the Court of Appeal held only that *de jure* segregation was not proven, and that a holding that an issue was "not proven" is, for purposes of res judicata, distinguishable from a holding that an issue was "disproved." We cannot accept these propositions.

First, the record fails to support the NAACP's assertion that the *Crawford* plaintiffs did not attempt to establish *de jure* segregation on the part of the District. The plaintiffs moved to be allowed to show a bad faith intent to segregate the Los Angeles schools on the part of the District, and Judge Gitelson granted the motion, E.R. 4, Ex. 5-6, thereby placing the issue of segregative intent before the court.[14] Moreover, as mentioned above, many of Judge Gitelson's findings of fact and conclusions of law were devoted to the *de jure* claim. No doubt it is true that the *Crawford* plaintiffs would have placed greater emphasis on *de jure* segregation had Proposition 1 then been in force. However, it provides no basis to deny the ordinary res judicata effect of the *Crawford* decision. See *Jorgensen v. Jorgensen,* 32 Cal.2d 13, 19, 193 P.2d 728, 732 (1948) ("a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case"). Nor in considering res judicata effect of a judgment on the merits, do we distinguish between a failure to prove a claim in an earlier proceeding, and holding that the claim had no merit. See *Kulchar v. Kulchar,* 1 Cal.3d 467, 473, 462 P2d 17, 20, 82 Cal.Rptr. 489, 492 (1969); Restatement (Second) of Judgments § 25, comment b ("A mere shift in the evidence offered to support a ground held unproved in a prior action will not suffice to make a new claim avoiding the preclusive effect of the judgment."); *see also People v. Sims,* 32 Cal.3d 468, 651 P.2d 321, 186 Cal.Rptr. 77 (1982). Thus, the fact that the *Crawford* plaintiffs placed greater emphasis in the *de facto,* rather than the *de jure,* segregation issue before the Superior Court does not prevent us from concluding that

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[14]The *Crawford* plaintiffs pleaded violations of the Fourteenth Amendment and the California Constitution, and Judge Gitelson based his decision on both constitutions. E.R. 3, at 28-29.

the claim was litigated, as well as decided in the California courts. It is not necessary for us to agree with either the manner in which it was litigated or with the final result of that litigation. *See Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). The important fact is that it was litigated.

Our invocation of res judicata is strengthened by the fact that the NAACP did not attempt to establish *de jure* segregation upon the remand following *Crawford II.* A litigant cannot simply move his case to federal court because he anticipates an unwelcome, albeit partially victorious, outcome in the state courts and thereby escape the ordinary preclusive effects of that outcome. *See Allen v. McCurry,* 449 U.S. 90, 104-05, 101 S.Ct. 411, 419-20, 66 L.Ed.2d 308 (1980).

More troublesome is fixing the scope of the res judicata bar. The district court believed that the *Crawford* litigation would preclude relitigation of the *de jure* claim only for the years 1963-1968, since the evidence presented to Judge Gitelson in the Superior Court involved the District's activities only during that period. 518 F.Supp. at 1060 n. 7. We disagree.

The parties were not limited to 1963-1968 period in their presentation of evidence. Although the *Crawford* parties stipulated that the plaintiffs need not introduce any evidence of the District's activities other than during the 1963 to 1968 period,[15] each was free to move for admission of evidence dating from before 1963 and after

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[15]The *Crawford* defendants also agreed not to object to any evidence from the 1963-1968 period on materiality or relevancy grounds, and to waive their right to move to dismiss the action for failure to prosecute. E.R. 4, Ex. 7. It should be noted that the 1963-1968 limitation on the introduction of evidence was based, at least in part,

1968. E.R. 4, Ex. 7. since res judicata precludes claims that might have been litigated, as well as those that actually were litigated, the res judicata bar embraces the period between 1963 and Judge Gitelson's decision in 1970.

The existence and scope of the post-1970 bar involves a similar analysis. According to both the district court and the parties, the *Crawford* plaintiffs could have reopened the *de jure* segregation claim on remand from the Court of Appeal in *Crawford II* to the Superior Court in 1981. 518 F.Supp. at 1059. No party chose to do so, however. The opportunity was permitted to slip by. Thus the *de jure* claim for the period from May 12, 1970 to September 10, 1981, when Judge Lopez terminated jurisdiction over the merits and remedies in the case, is barred. *Mattson v. Costa Mesa,* 106 Cal.App.3d 441, 446, 164 Cal.Rptr. 913, 916 (1980).[16]

3. *Same Parties*

Fixing the identity of the parties barred by res judicata also poses some difficulty. The rule is that a judgment for the named plaintiffs in a class "will be binding on all the persons belonging to the class . . . and . . . subsequently coming into the class." *King v. International Union of*

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on the absence of reliable records for the years before 1966. E.R. 5, Ex. DD, at 8.

[16]The NAACP also argues that res judicata cannot be a bar here because the decision in favor of the plaintiffs in *Crawford* was based entirely on state law, *see Crawford v. Board of Education,* ____ U.S. ____, 102 S.Ct. 3211, 3214 & n. 2, 73 L.Ed.2d 948 (1982). The NAACP errs in this conclusion, however. While the *Crawford* plaintiffs prevailed on their state law claim, the federal claim was also litigated and decided, in favor of the defendants, *see Crawford v. Board of Education,* 113 Cal.App.3d at 649, 170 Cal.Rptr. at 506, and is therefore barred. *See Boccardo v. Safeway Stores, Inc.,* 134 Cal.App.3d 1037, 1054, 184 Cal.Rptr. 903, 914 (1982).

Operating Engineers, 114 Cal.App.2d 159, 164-65, 250 P.2d 11, 14 (1952). It follows that the judgment in *Crawford* therefore binds all the members of the *Crawford* class. That class closed on the date the *Crawford* litigation terminated, September 10, 1981.

The question then arises whether the *Crawford* judgment can bar the present case. Our difficulty springs from the fact that the present class is not completely identical to that of *Crawford.* The present class, the class on whose behalf this suit was brought, did not close on September 10, 1981. It remains open.[17] School children not in the *Crawford* class now are in the class involved in the present suit.

Where, however, the earlier and later classes are "substantially identical" and the interests of the later class were represented by the earlier, a judgment in the earlier case can preclude the later one. *See Bell v. Board of Education,* 683 F.2d 963, 964-65 (6th Cir.1982); *Bronson v. Board of Education,* 525 F.2d 344, 349 (6th Cir.1975), *cert. denied,* 425 U.S. 934, 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976); *Antonioli v. Lehigh Coal and Navigation Co.,* 451 F.2d 1171, 1177 & n. 22 (3d Cir.1971), *cert. denied,* 406 U.S. 906, 92 S.Ct. 1608, 31 L.Ed.2d 816 (1972); *see also Fowler v. Birmingham News Co.,* 608 F.2d 1055 (5th Cir.1979); *Rynsburger v. Dairymen's Fertilizer Coop., Inc.,* 266 Cal.App.2d 269, 278, 72 Cal.Rptr. 102, 107 (1968) (adjudication in nuisance action litigated by the government can bind a later class action on an identical claim because the class was so well represented in the earlier

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[17]On February 16, 1982, the district court certified the present class as consisting of all black students who live within the District and are eligible to attend one of the District's schools during the pendency of this lawsuit. The *Crawford* class consisted of black and Mexican-American children attending the District's schools.

suit that its "interest received actual and efficient protection").

The *Bronson* court explained:

> [A] public body should not be required to defend repeatedly against the *same* charge of improper conduct if it has been vindicated in an action brought by a person or group who validly and fairly represent those whose rights are alleged to have been infringed. Though the plaintiffs in the instant action are not the same persons as those who instituted [the earlier action], that action was brought to vindicate the rights of all minority school children and parents affected by the actions and policies of the . . . Board. There is a strong community of interest between the [earlier class] and the *Bronson* plaintiffs and both actions sought relief on behalf of the same large group of black citizens. For the purposes of [preclusion]we do not consider the plaintiffs in the present action to be "strangers" to the [earlier] litigation.

525 F.2d at 349 (emphasis original).[18]

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[18]In *Bronson v. Board of Education*, the court held that collateral estoppel, rather than res judicata, barred a second class action where the members of the later class were different from those of the earlier, and the earlier class was "spurious," *see Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), rather than a "true class." The *Bronson* court reasoned that although the parties to the earlier and later proceedings were not the same, the two actions were brought to vindicate identical rights. *See also Bell v. Board of Education*, 683 F.2d 963, 964-65 (6th Cir. 1982). This aspect of *Bronson* is distinguishable form the present case, however, since *Crawford* was a true class action, rather than a spurious one, and was treated as such by the California courts, thereby making the application or res judicata appropriate to the present class action. *Id.* at 969-70 (Brown, J., concurring). It is also noteworthy that the *Bronson* class scarcely overlapped with the earlier proceeding, while almost every member of

The members of the class of the present case, which grows in numbers each year, are "substantially identical" to those of *Crawford*. Their interests were well represented there. We hold, therefore, that the *Crawford* adjudication bars the present class from relitigating the claim that the Los Angeles schools were segregated *de jure* on or before the final judgment in *Crawford*. *See Garcia v. Board of Education*, 573 F.2d 676, 678-79 (10th Cir. 1978) (res judicata bars class action on behalf of Hispanic children attending school affected by desegregation plan where all Hispanic children in school district were parties and had their interests represented in earlier suit, even though earlier suit was terminated before later suit was brought); *Antonioli*, 451 F.2d at 1177 & n. 22.

The NAACP presents three arguments against this conclusion. First, it contends that res judicata applies only to classes that are formally certified, which that in *Crawford* was not. Second, the NAACP claims that the *Crawford* class does not embrace children who entered the Los Angeles schools after May 1970, when Judge Gitelson issued his decision. Finally, it asserts that, in the context of class actions res judicata only precludes claims that were fully litigated and decided, and not claims that might have been litigated, but were not. We shall address each argument.

First, while it is true that the class in *Crawford* was never formally certified since formal procedures for class certification were not available to the Superior Court of Los Angeles County until 1973, that does not preclude giving res judicata effect to the *Crawford* decision. The California courts have treated *Crawford* as a class action, *see, e.g., Crawford I*, 17 Cal.3d at 286, 551 P.2d at 31, 130

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the present class was also a party in *Crawford* when this action was filed, and today the two classes remain substantially identical.

Cal.Rptr. at 727, as has the Supreme Court, *Crawford v. Board of Education,* ____ U.S. ____, 102 S.Ct. 3211, 3214, 73 L.Ed.2d 948 (1982). We, too, are entitled to treat it as a class action. *See Jackson v. Hayakawa,* 605 F.2d 1121, 1126 & n. 7 (9th Cir.1979), *cert. denied,* 445 U.S. 952, 100 S.Ct. 1601, 63 L.Ed.2d 787 (1980) (giving res judicata effect to judgment against class never formally certified by California courts, but treated by them as a class action); *see also Johnson v. General Motors Corp.,* 598 F.2d 432, 434-35 (5th Cir.1979).

Second, the Crawford loss did not close in 1970. The order issued by Judge Lopez on September 10, 1981, approving the District's plan and resolving the merits of *Crawford,* refers to "present conditions" in the District. The order makes it crystal clear that the remedy is intended to benefit school children attending the Los Angeles schools in 1981, and not merely class members as of May 1970. Indeed, Judge Lopez devoted considerable attention to the fact that conditions had changed substantially between 1963 and 1981. *See* September 10, 1981 Order at 4-7. Thus, the court treated the *Crawford* class as remaining open until 1981, and not as having closed with Judge Gitelson's decision in 1970. It follows that the children who entered the class after 1970 and before September 10, 1981 fall into the category of persons "subsequently coming into the class," and are bound by the final judgment on the merits. *See Williams v. California,* 62 Cal.App.3d 960, 965, 133 Cal.Rptr. 539, 542 (1976).

The NAACP's third contention — that only claims that were fully litigated can be barred — is also without merit. It relies for this proposition on *Bronson v. Board of Education,* 535 F.Supp. 846 (S.D.Ohio 1982), where it was held that a 1965 district court decision that the Cincinnati schools were not illegally segregated did not

preclude relitigation of pre-1965 segregation in Cincinnati. The reason for the district court's holding was that the parties to the earlier decision did not have the benefit of subsequent Supreme Court decisions, and therefore did not litigate the segregation issue with the same emphasis and as fully as the plaintiffs in the later proceeding would do. *Id.* at 900-06.

The Sixth Circuit, subsequent to the filing of the NAACP brief in the present case, reversed this decision. *Bronson v. Board of Education,* 687 F.2d 836 (6th Cir.1982). The court noted that the Supreme Court has not set forth a new theory of liability for unlawful segregation under the Fourteenth Amendment, but has merely suggested new, non-exclusive methods of establishing a constitutional violation. *Id.* at 841.

The Sixth Circuit in this *Bronson* case looked to *Bell v. Board of Education,* 683 F.2d 963, 965 (6th Cir.1982), and to its earlier decision in *Bronson,* 525 F.2d at 349. This earlier decision held relitigation was precluded because the issues had been decided in the earlier actions, the classes were adequately represented there, and there has been no significant change in the law.

The present case clearly meets these requirements. The *de jure* claim was decided in *Crawford.* No one disputes that the *Crawford* class was adequately represented.[19] And while the passage of Proposition 1 has altered California law, the present case is based on *federal* law, in which the basic theory of liability for unlawful segregation has remained substantially the same. *See Bronson,* 687 F.2d at 841; *Crawford v. Board of Education,* 113

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[19]Judge Lopez characterized the *Crawford* plaintiffs as the "prevailing party" and awarded their counsel over one million dollars in attorneys' fees. Final Order Terminating Jurisdiction at 1, 14 (Superior Court of Los Angeles County No. C822854 Nov. 25, 1981).

Cal.App.3d at 638-41, 170 Cal.Rptr. at 498-501; *see also Washington v. Davis,* 426 U.S. 229, 240, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 11-16, 91 S.Ct. 1267, 1273-76, 28 L.Ed.2d 554 (1971).

As the *Bell* court noted, if future classes are not barred by an earlier decision of no segregation, then:

> we would open up for relitigation all school desegregation judgments . . . . A plaintiff who disagrees with a prior final determination of liability . . . would be entitled to relitigate the finding of liability. Rights and duties in desegregation cases previously litigated and established would never become final. They would always be subject to collateral attack. Desegregation judgments, like tickets to the theater, would be good for today's show only.

683 F.2d at 966. We can only add that to limit res judicata in school desegregation cases to those issues adjudged after the fact to have been fully and adequately litigated would be to endow such cases with everlasting life. This we should not do. As Judge Lopez observed in his September 10, 1981 Order at 7, "There must be finality in the law."

Thus, we hold that all members of the class in this litigation are barred by res judicata from relitigating the claim of *de jure* segregation in the District occurring before September 10, 1981.

B. *Collateral Estoppel*

This conlusion is buttressed by collateral estoppel. For collateral estoppel to apply, there must be final judgment on the merits, the issue decided in the prior adjudication must be indentical to the one presented in the later proceeding, and the party against whom the plea of

estoppel is asserted must have been a party or in privity with a party to the earlier action. *Bernhard v. Bank of America,* 19 Cal.2d 807, 813, 122 P.2d 892, 895 (1942).

The discussion of the final judgment and indentical party requirements in the context of res judicata applies equally to collateral estoppel. The NAACP asserts, however, that even if these two requirements are met, collateral estoppel cannot preclude the present action, since the doctrine only affects issues that are "litigated and determin d." *See People v. Sims,* 32 Cal.3d 468, 651 P.2d 321, 186 Cal.Rptr. 77 (1982). *De jure* segregation, the NAACP asserts, was *raised* and *decided* in *Crawford,* but not *litigated.* This position parallels that taken with respect to res judicata. It is likewise erroneous.

As previously noted, the *Crawford* plaintiffs raised, and had the opportunity fully to litigate, the *de jure* issue, not only for 1963-1968, but also for the pre-1963 era, and for the period from the beginning of the Superior Court trial in 1968 until the termination of jurisdiction over them in 1981. However, the *Crawford* plaintiffs chose not to do so as extensively as it might have. Thus, *de jure* segregation falls into the category of issues which were pleaded and decided, but not as fully litigated as it was possible to do as a result of the choice of the party against whom estoppel is asserted. Under California law, when an issue is decided against a party which has chosen not to litigate it, that party is estopped from relitigating the issue. *See People v. Sims,* 32 Cal.3d 468, 651 P.2d 321, 186 Cal.Rptr. 77 (1982). There, a county was collaterally estopped from prosecuting one accused of welfare fraud because it failed to present evidence of fraud in an administrative hearing

brought by the accused in an effort to disprove the allegation prior to the prosecution.

The California Supreme Court said:

> What is significant here is that the County had notice of the hearing as well as the opportunity and incentive to present its case to the hearing officer .... The People cannot now take advantage of the fact that the County ... chose not to present evidence at the prior proceeding.

32 Cal.3d at 481-82, 651 P.2d at 329, 186 Cal.Rptr. at 85.

Although *Sims* is distinguishable from the present case, it remains true that the *Crawford* plaintiffs had both the opportunity and incentive to litigate fully the question of *de jure* segregation in the District before 1981. Only by doing so could they obtain mandatory busing. They did not do so. They came to federal court. We hold that they are estopped to litigate in this forum *de jure* segregation in the District before September 10, 1981.

III.

CONCLUSION

The conditions for applying both res judicata and collateral estoppel have been met in the present case. Moreover, the California courts amply satisfied the requirements of the Due Process Clause in the *Crawford* litigation. *See Kremer v. Chemical Consturction Corp.*, 456 U.S. 461, 482, 102 S.Ct. 1883, 1898, 72 L.Ed.2d 262 (1982).

We therefore hold that the present plaintiffs are barred from relitigating the claim that the District was segregated *de jure* on or before September 10, 1981. The plaintiffs, of course are not barred from asserting that the

District was segregated unlawfully after that date. On remand the plaintiffs may present evidence at trial of relevant District actions before 1981, but the rules of relevancy should be evenly applied. *See Bronson,* 687 F.2d at 839.

REVERSED AND REMANDED.

APPENDIX C

LOS ANGELES NAACP, ET AL.,
PLAINTIFFS,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, ET AL.,
DEFENDANTS.

No. CV 81-1811 AWT.

United States District Court,
C. D. California.

July 16, 1981.

Thomas I. Atkins, Gen. Counsel, N.A.A.C.P. Special Contribution Fund, New York City, Joseph H. Duff, Los Angeles, Cal., Peter Graham Cohn, San Francisco, Cal., for plaintiffs.

G. William Shea, Peter W. James, David T. Peterson, Michael M. Johnson, McCutchen, Black, Verleger & Shea, Los Angeles, Cal., Jerry F. Halverson, Los Angeles, Cal., for defendants Los Angeles Unified School District, Board of Education of the City of Los Angeles, William J. Johnston, Superintendent of Schools.

George Deukmejian, Atty. Gen. of Cal., G. R. Overton, Scott Rasmussen, Deputy Attys. Gen., Los Angeles, Cal., for defendants Edmund G. Brown, Jr., Governor of the State of California, California State Board of Education, California Department of Education, Wilson Riles, Superintendent of Public Instruction.

MEMORANDUM OPINION AND ORDER

TASHIMA, District Judge.

In this action against the Los Angeles Unified School District (the "District"), District officials and certain State defendants, the District (or local) defendants have moved to dismiss the action for lack of subject matter jurisdiction, Rule 12(b)(1), Fed.R.Civ.P., and for failure to state a claim on which relief can be granted, Rule 12(b)(6), Fed.R.Civ.P. In the alternative, District defendants move that this Court abstain from exercising its jurisdiction "in view of the pending state court proceeding in *Crawford v. Board of Education* (Los Angeles County Superior Court No. C822854)." The remaining defendants, Governor Edmund G. Brown, Jr., Wilson Riles, Superintendent of Public Instruction, California State Board of Education and California Department of Education (collectively the "State defendants") have also filed motions to dismiss. They join in the local defendants' motion that this Court abstain. Additionally, they assert two grounds peculiar to themselves, Eleventh Amendment immunity and lack of an Article III justiciable controversy.

Although the complaint refers to pendent state claims without alleging what those claims are, the primary claim here is brought under 42 U.S.C. § 1983 for deprivation of constitutional rights. The federal claim alleged is that defendants have instituted and maintained a system of *de jure* segregation in the Los Angeles schools in violation of the Fourteenth and other Amendments of the Constitution. Plaintiff membership associations bring this action on behalf of their members and on behalf of a putative class of all black children attending the Los Angeles City schools.

We first address the grounds on which the local defendants' motion to dismiss is based. These grounds are, first, that this action is barred by the doctrine of res judicata because of prior proceedings in state court and, secondly, that, even if not barred, this Court should abstain from exercising its jurisdiction because of the pendency of ongoing proceedings in state court.

Res Judicata

The District defendants contend that the complaint fails to state a claim and that the action should be dismissed because, under the doctrine of res judicata, the claim here has been previously adjudicated in the California state courts. The judgment pleaded as a bar is the opinion and remittitur[1] of the California Court of Appeal in *Crawford v. Board of Education,* 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980), *petition for cert. filed,* U.S.L.W. (No. 81-38, Jul. 8, 1981) ("*Crawford II*"). Disposition of this contention requires a brief summary of the long history of the state court proceedings.

Crawford was commenced in the Los Angeles Superior Court in 1963, shortly after the landmark decision in *Jackson v. Pasadena City School Dist.,* 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963). In *Jackson,* the California Supreme Court stated that a school desegregation action stated a cause of action "even in the absence of . . . affirmative discriminatory conduct by the school board," that where segregation exists in fact, "it is not enough for a school board to refrain from affirmative discriminatory conduct," and that "the right to an equal opportunity for education and the harmful consequences

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[1]Under California law the remittitur of an appellate court is its final judgment. Rule 25(a), Cal. Rules of Court. It is equivalent to the mandate in federal practice. *See* Rule 41(a), Fed.R.App.P.

of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." *Id.* at 881, 31 Cal.Rptr. 606, 382 P.2d 878. In short, *Jackson* eliminated any practical distinction between *de jure* and *de facto* segregation insofar as it may have affected the right to seek a judicially ordered remedy to school segregation. It is obvious that *Jackson* served as a benchmark in guiding the actions of the parties in *Crawford* and the lower courts for 17 of the 18 years during which that action has been pending.

Crawford was originally brought as a class action on behalf of a limited number of black school children, but the class allegations were later amended to include all black and Mexican school children in the District. Although the state courts appear implicitly to have treated the case as a proper class action, nothing in the record here indicates that any hearing was held or any express determination was ever made that the case was properly a class action, that it should proceed as such, that the class sought to be represented was appropriate or that the representatives were adequate and proper; indeed, there has never been any determination of who the members of the class are.[2]

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[2]The District defendants correctly point out that at the time *Crawford* was filed and through the trial on liability there were no formalized procedures in California akin to Rule 23, Fed.R.Civ.P., for the determination of class issues, although class actions have long been recognized under California law. Cal. Code Civ.Proc. § 382 (enacted in 1872); *see, e.g., Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732 (1967). On the other hand, implicit in defendants' position is that class membership has remained open-ended throughout the 28 years of the state court litigation and remains open, *i. e.*, as minority children become of school age they are

The action was bifurcated and liability was tried by the late Judge Alfred T. Gitelson for 65 days between October 1968 and May 1969. By stipulation of the parties, approved by the court, evidence as to liability was limited to the period from the filing of the complaint in 1963 to commencement of trial in 1968. On May 12, 1970, Judge Gitelson filed his findings of fact and conclusions of law, finding in favor of plaintiffs, and issued a peremptory writ of mandate. In his findings, Judge Gitelson found *de jure* segregation.

An appeal was taken and, in 1976, the California Supreme Court modified and affirmed Judge Gitelson's decision. *Crawford v. Board of Education,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976) ("*Crawford I*"). Although the court stated that, "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature," it further stated, "that we do not rest our decision on this characterization because we continue to adhere to our conclusion in *Jackson* that school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation 'regardless of its cause.' " *Id.* at 285, 130 Cal.Rptr. 724, 551 P.2d 28.[3]

On remand to the Superior Court, extensive hearings were held commencing in early 1977 with respect to the

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automatically co-opted into the class. The issues raised by this fluid class concept are addressed, *infra.*

[3]Apparently because no issue with respect to the class aspects of the case was raised, the only reference by the California Supreme Court to any class aspect of the case was the passing statement that, "plaintiffs . . . filed this class action" shortly after *Jackson. Id.* 17 Cal.3d at 286, 130 Cal.Rptr. 724, 551 P.2d 28. *Crawford II* also contains no mention of the class aspects of the case.

appropriate remedy. A number of plans were proposed and rejected and in February 1978, an interim plan involving mandatory busing, Plan 2, was ordered to be implemented the following September. While hearings were being conducted on whether or not Plan 2 should be continued in effect, the California electorate approved Proposition 1, an initiative measure on the November 6, 1979, ballot, amending Article I, section 7(a), of the California Constitution. Proposition 1 provided that pupil assignment and pupil transportation were available as remedies under the California Constitution only when such a remedy would be available in federal courts for violation of the Fourteenth Amendment of the United States Constitution. Thus, the effect of Proposition 1 was to nullify *Jackson* and the line of cases following *Jackson* under which pupil assignment and transportation were available remedies for school segregation "regardless of its cause," *i.e.,* whether it was *de jure* or *de facto.*

Shortly after Proposition 1 was adopted, defendants in *Crawford* applied for modification of Plan 2. In 1980, the Superior Court denied the application under Proposition 1 and adopted Plan 3, involving more extensive mandatory pupil assignment than Plan 2, to be implemented in September of that year. The District appealed and on December 19, 1980, the California Court of Appeal, in *Crawford II,* vacated the order adopting Plan 3 and the case was "remanded to the trial court for further proceedings consistent with this opinion." 113 Cal.App.3d at 656, 170 Cal.Rptr. 495. In reviewing the 1970 findings, *Crawford II* first noted that, "the trial court made these deductions and inferences in 1970 at a time it did not have the benefit of the more recent decisions of the United

States Supreme Court."[4] *Id.* at 644, 170 Cal.Rptr. 495. It then concluded that, "When the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory pupose was found." *Id.* at 645, 170 Cal.Rptr. 495. Treating the trial court's findings of *de jure* segregation as a "characterization" and a conclusion of law not binding on an appellate court, *Crawford II* held:

> "In sum, no federal violation of law was established by the 1970 findings, and the trial court's indentification of the then existing racial segregation within the Los Angeles school system as de jure segregation was true only in the Pickwickian sense, and was not true at all in the sense of federal law. Because there was no evidence of acts done with specific segregative intent and discriminatory purpose, there was no federal constitutional violation — regardless of the terminology used by the court."

Id. at 646, 170 Cal.Rptr. 495. The California Supreme Court denied a hearing and, as noted earlier, a petition for write of certiorari is now pending before the United States Supreme Court.

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[4] For this reason alone, collateral estoppel is also inapplicable to this case. *Commissioner v. Sunnen,* 333 U.S. 591, 599-602, 68 S.Ct. 715, 720-721, 92 L.Ed. 898 (1948); *see also, Los Angeles Unified School Dist. v. United States Dist. Court,* 650 F.2d 1004 at 1012 (9th Cir. 1981) (Ferguson, J., dissenting) ("Collateral estoppel may not be applied in situations in which intervening modifications in the law create a new legal climate."), and cases cited therein. The same exception also may preclude the application of res judicata. *State Farm Mut. Auto. Ins. Co. v. Duel, 324* U.S. 154, 162, 65 S.Ct. 573, 577, 89 L.Ed. 812 (1945).

As most recently stated by the Supreme Court, "There is little to be added to the doctrine of res judicata as developed in the case law of this court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the action." *Federated Dep't Stores, Inc. v. Moitie,* ____, U.S. ____, ____, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). Thus, application of res judicata depends on the presence of two elements: First, a *final* judgment on the merits and, second, identity of parties or their privies. On the record here — the complaint and judically noticed facts under Rule 201, Fed.R.Evid., of proceedings in *Crawford* as reflected in documents supplied by the parties — I conclude that neither of these requirements has been met.

District defendants contend that the remittitur in *Crawford II* is a final judgment. However, its very words defy characterizing it as *final.* It remands the case to the Superior Court for further proceedings. As recently noted by the Supreme Court in a slightly different but analogous context:

> "Under California law, an appellate court reversal of a trial court decision has the effect of vacating the judgment and returning the case to the trial court for a new trial 'as if no judgment had ever been rendered.' See *Erlin v. National Fire Ins. Co.,* 7 Cal.2d 547, 549 [61 P.2d 756] (1936); *Salaman v. Bolt,* 74 Cal.App.3d 907, 914 141 Cal.Rptr. 841, 844 (1977). Thus, the losing party on appeal may introduce additional evidence. See *Gospel Army v. Los Angeles,* 331, U.S. 543, 547-548, 67 S.Ct. 1428, 1430, 91 L.Ed. 1662, quoting *Erlin, supra.* Although this rule regarding new trials does not apply if the appellate court did not intend a new trial, *Stromer v. Browning,*

268 Cal. App.2d 513, 518-519, 74 Cal.Rptr. 155, 158 (1968), such as when the appellate court decides a dispositive issue which does not turn on facts which might change on retrial, *id.*, at 519; 74 Cal.Rptr., at 160, the Court of Appeal clearly contemplated a possible retrial here."

Minninck v. California Dep't of Corrections, ____, U.S. ____ ____, 101 S.Ct. 2211, 2222-23, 68 L.Ed.2d 706 n.37 (1981) (determination by California Court of Appeal reversing trial court judgment not "final" for purposes of certioriari jurisdiction under 28 U.S.C. § 1257(3)).

In *Crawford*, pursuant to the Court of Appeal's remittitur in *Crawford II*, further proceedings on remand have resumed in the Superior Court. In fact, plaintiffs in *Crawford* have taken the position that they are entitled to reopen or retry the issue of *de jure* segregation. Thus, the possibility of a retrial and the taking of additional evidence remains open; certainly, *Crawford II* does not clearly preclude such a result. There is no final judgment.[5]

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[5]Although it is unnecessary to reach the issue, it should be noted that *Crawford II* may not meet the final judgment requirement for another reason. In *Federated Dep't Stores, supra*, ____ *U.S. at* ____, *101 S.Ct. at 2427, while noting its own "rigorous application" of the doctine, the Supreme Court expressly refused to decide whether res judicata applied to additional state law claims not raised in the prior federal action. Id.* at____, 101 S.Ct. at 2429; *compare id.* at ____, 101 S.Ct. at 2429 (Blackmun, J., concurring) (" . . . in contrast, I would flatly hold that Brown I [the prior action] is res judicata as to respondents state law claims"). In *Crawford II*, the California Supreme Court's opinion in *Crawford I* was interpreted to make clear that the claim in *Crawford* was a state law claim. As stated by the Court of Appeal, in *Crawford I*, "state law was formally severed from federal law, and school boards were placed under an affirmative duty

Finally, with respect to this requirement, the District defendants' second basis for this motion makes it plain that no final judgment exists. That basis is that this Court should abstain from exercising its jurisdiction because not to do so would interfere with the pending proceedings in *Crawford*. The rhetorical question which immediately comes to mind is, How can there be a final judgment if the proceedings are still pending? To ask the question is to answer it. *E. g., Federated Dept. Stores, supra; Gospel Army v. Los Angeles,* 331 U.S. 543, 67 S.Ct. 1428, 91 L.Ed. 1662 (1947); *McGourkey v. Toledo & Ohio Ry.*, 146 U.S. 536, 545, 13 S.Ct. 170, 172, 36 L.Ed. 1079 (1892); *Beebe v. Russell*, 60 U.S. (19 How.) 283, 15 L.Ed. 668 (1857).

The answer to the second inquiry, identity of parties or their privies, is more easily ascertainable when only individual parties—as opposed to classes—are involved. Here, the problem is even more complicated than in an ordinary class action because the class or classes involved in the prior action have never been defined or determined. The problem arises primarily because under the District defendants' contention there is no end to the size of and membership in the class. Because the state courts have, at best, only implicity determined that *Crawford* is properly a class action, there has never been any determination as to the time period involved or the date after which those black children coming of school age will no longer automatically become co-opted into the class. It was probably

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. . . to alleviate segregation . . . regardless of the cause of the segregation. The existence of the duty was derived both from state decisional law and from the equal protection clause in article I, section 7, subdivision (a) of the California Constitution." 113 Cal.App.3d at 651, 170 Cal.Rptr. 495 (citations omitted). *Crawford* is, thus, the converse of *Federated Dep't Stores* — the prior action being a state law claim and the subsequent one federal.

intended by the Superior Court that all black and Mexican school children in the District as of the date its writ of mandate was issued in 1970 be treated as members of the class and bound by the judgment. But should those who have come of school age since then be treated as members of this implicit class? Should black children who have come of school age since *Crawford II*, contended by local defendants to be final a judgment, be treated as implicit class members? If the answer to either of these questions is in the affirmative, should such school children by barred from litigating claimed *de jure* segregation occuring since 1970 or since 1980?

Because no class was ever formally certified by the trial court in *Crawford*, the scope of the class for res judicata purposes must be determined by implication from Judge Gitelson's 1970 findings of fact and conclusions of law, which were "final" in at least the same sense as *Crawford II* is claimed to be "final". *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979); *Bing v. Roadway Express*, 485 F.2d 441, 447 (5th Cir. 1973). There is no intimation that Judge Gitelson intended to include all future school children within the scope of his order.[6] *Cf. Johnson, supra*, 598 F.2d at 435 (decree in prior case included all present and future employees subjected to employment discrimination).

The claim to be adjudicated here is whether or not *de jure* segregation exists today in the District schools. The claim adjudicated in *Crawford* was whether or not, based on evidence limited to the 1963-1968 period, segregation existed in the District schools in 1970, when the liability

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[6]It is doubtful that in 1970, Judge Gitelson expected remedy to still be at issue 11 years later.

findings were rendered. No other determination of liability has been made in *Crawford*. Because of the difference between these claims,[7] those putative members of the class here who were not of school age on May 12, 1970, the date of Judge Gitelson's findings of fact, but are of school age at this time are not similarly situated to the children who were of school age at the earlier date. For res judicata purposes, then, the class now before the state court includes only those children who were class members in 1970.[8] Conversely, children who have entered the

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[7]Because the claims are different, the issues in this case are not the same as the issues that were before the state trial court in 1970. The test for determining whether claims are duplicative is:

> "[W]hether a different judgment in the subsequent action would impair the rights created pursuant to the judgment rendered in the prior action; whether the evidentiary basis of the first and second actions is the same, or whether the essential facts and issues were similarly presented in both cases."

Expert Electric v. Levine, 554 F.2d 1227, 1234 (2d Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977) (citations omitted). Judge Gitelson's 1970 opinion considered the defendants' conduct only during the period from 1963 to 1968; and he reached the determination that the schools were segregated as of the time that the liability trial concluded. *Crawford I, supra*, 17 Cal.3d at 288, 130 Cal.Rptr. 724, 551 P.2d 28. No new liability findings have been rendered since that time. Accordingly, even if any of the state court decisions are considered final, this Court may decide whether there is segregation in 1981 without impairing any of the rights created in any of the previous liability "judgments." Plaintiffs here allege a continuing course of conduct on defendants' part, including acts which both ante date and post date the 1963-1968 period considered by Judge Gitelson. I, therefore, find that the claims are not the same and that there is no identity of issues between this case and the pending state proceeding. This, of course, constitutes an independent ground for the inapplicability of res judicata.

[8]Although *Crawford II*, contended by the local defendants to be a final judgment, was not decided until 1980, it merely reversed Judge

school system since that time are not members of that class, and not barred by res judicata from asserting their rights here.

The doctrine of virtual representation, adopted by some courts, is not applicable to this situation. "Generally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation." *Expert Electric, supra,* 554 F.2d at 1233; *Aerojet General Corp. v. Askew,* 511 F.2d 710, 719 (5th Cir.), *cert. denied.* 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). *See also, Garcia v. Board of Education, School District No. 1,* 573 F.2d 676, 680 (10th Cir. 1978). The multitude of significant events that have transpired since 1970 give rise to serious doubts that the interests of the children who are now attending school are substantially identical to the interests of the children who were attending school in 1970. Only the latter interests were presented and pursued before Judge Gitelson, and it would be a denial of due process to bar those children who have since come of age from pursuing their own interests before this Court.

If there was a final judgment, then, the parties in *Crawford* and before this Court are not identical.[9]

For these reasons, it is concluded that the doctrine of res judicata is inapplicable on the record here.

Gitelson's 1970 findings of *de jure* segregation and, therefore, did not alter the class.

[9]It requires no discussion to conclude that they also are not privies in any legal sense. *See* Restatement of Judgments § 83.

Abstention

The District defendants next contend that this court should abstain from exercising its jurisdiction and dismiss the action. They are joined in this contention by the State defendants. Defendants rely on *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, particularly *Moore v. Sims,* 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979).

The law regarding abstention was recently reviewed and restated in *L. H. v. Jamieson,* 643 F.2d 1351 (9th Cir. 1981) (*per curiam*). In that case the court canvassed all of the applicable Supreme Court cases and concluded:

> "*Younger* and its progeny share two principal characteristics: (1) the plaintiffs sought to enjoin continuation of a state proceeding or sought to enjoin state officials from enforcing a state statute, and (2) the basis for federal relief could have been raised as a complete or partial defense to a pending or ongoing state enforcement action during the normal course of the state proceeding. When these two characteristics are present, the argument for employing equitable restraint is compelling . . . .
>
> "When these characteristics are not present, however, the Supreme Court has refused to find the *Younger* concerns sufficiently compelling to warrant federal equitable restraint, even where a plaintiff could have raised his claim in a pending state proceeding."

Id. at 1352-54 (footnote and citations omitted).

Neither of the conditions required for the application of *Younger*-type abstention is present here. Plaintiffs do not seek to enjoin either continuation of a state proceeding or the enforcement of a state statute by state officials. Since

there is or never has been any state "enforcement" action, plaintiffs could not have raised the basis for federal relief here as a complete or partial defense to such a pending state enforcement action.

Under *L. H. v. Jamieson, supra,* the most recent and controlling Ninth Circuit authority, *Younger*-type abstention is inapplicable.

Colorado River Dismissal

The next ground for dismissal raised by the District defendants and joined in by the State defendants is that this action should be dismissed in order to avoid duplicative litigation. Defendants primarily rely on *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), in which the Supreme Court held that a federal court may dismiss a case involving a question of federal law where a concurrent state action is pending in which the identical issues are raised.

The lower federal courts have long held that a federal district court has the power to stay an action where there is a pending state action presenting the same issues in order to foster the interests of judicial administration: comprehensive disposition of litigation, conservation of judicial resources; and fairness to parties. *E. g., Weber v. Consumer's Digest, Inc.,* 440 F.2d 729 (7th Cir. 1971); *Klein v. Walston & Co., Inc.,* 432 F.2d 936 (2d Cir. 1970) (*per curiam*); *Amdur v. Lizars,* 372 F.2d 103 (4th Cir. 1967); *Lear Siegler, Inc. v. Adkins,* 330 F.2d 595 (9th Cir. 1964); *Milk Drivers and Dairy Employees Union v. Dairymen's League Co-op. Ass'n,* 304 F.2d 913 (2d Cir. 1962); *Beiersdorf & Co., Inc. v. McGohey,* 187 F.2d 14 (2d Cir. 1951); *Mottolese v. Kaufman,* 176 F.2d 301 (2d Cir. 1949).

In *Colorado River,* the Court articulated the controlling legal standard justifying the stay or dismissal of an action in federal court because of a concurrent state court proceeding, even though federal jurisdiction is properly invoked.[10] The general rule is that the pendency of an action in state court is no bar to proceedings concerning the same matter in federal court. *McClellan v. Carland,* 217 U.S. 268, 282, 30 S.Ct. 501, 504, 54 L.Ed. 762 (1910); see *Donovan v. City of Dallas,* 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964). While there are circumstances which permit dismissal of a federal suit due to the presence of concurrent state proceedings, these circumstances are exceptional. *Colorado River, supra,* 424 U.S. at 817-18, 96 S.Ct. at 1246.

Thus, the focus under *Colorado River* is "upon whether exceptional circumstances exist which indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results." *Tovar v. Billmeyer,* 609 F.2d 1291, 1293 (9th Cir. 1980). Other factors to be considered include the inconvenience of the federal forum and the order in which jurisdiction

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[10]In *Colorado River,* the Court also analogized to cases involving disputes over the disposition of specific property, in which the court first obtaining jurisdiction over the property may exercise its jurisdiction to the exclusion of other courts, citing, *inter alia, Princess Lida v. Thompson,* 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939); *United States v. Bank of New York Co.,* 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936). Because "there is only one Los Angeles Unified School District," the District defendants contend that this action should be dismissed because the state courts first obtained jurisdiction over the District. This is not a dispute over the disposition of property and direct application of any analogy to probate or trust or corporate liquidation proceedings is completely inapposite.

was obtained by the concurrent forums. *Colorado River, supra,* 424 U.S. at 818, 96 S.Ct. at 1246.

Dismissal, however, is proper only when, in the judgment of the court, any adverse consequences outweigh in a given situation the "unflagging obligation" of the federal courts to exercise the jurisdiction given to them. *Id.* at 817-18, 96 S.Ct. at 1246; *Tovar v. Billmeyer, supra,* 609 F.2d at 1293. "No one factor is necessarily determinative; a carefully considered judgment, taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise, is required." *Id.* It should also be noted that in *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 663-64, 98 S.Ct. 2552, 2557-58, 57 L.Ed.2d 504 (1978) (plurality opinion), a case subsequent to *Colorado River,* the Supreme Court held that the decision whether to defer to the concurrent jurisdiction of a state court is a matter committed to the district court's discretion.

In *Tovar v. Billmeyer, supra,* the Ninth Circuit indicated that in cases where the plaintiffs assert a right to relief under 42 U.S.C. § 1983, the obligation of the federal courts to exercise the jurisdiction given to them is "particularly weighty." 609 F.2d at 1293. The Court stated:

> "Under such circumstances conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief § 1983 assures. While we need not conjecture whether there exist circumstances that could outweigh the 'unflagging obligation' in section 1983 cases, we are convinced that they do not exist in this case."

Id.

As in *Tovar v. Billmeyer, supra,* the circumstances here militate against deference to pending state court proceedings. First, there is no exceptional circumstance, such as the McCarran Amendment, 43 U.S.C. § 666, which *Colorado River* found embodied a clear federal policy of avoiding the piecemeal adjudication of water rights in a river system. 424 U.S. at 819, 96 S.Ct. at 1247. On the contrary, § 1983 evinces a strong congressional policy of providing a federal forum to those alleging a violation of their rights under the United States Constitution. *See Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Tovar v. Billmeyer, supra,* 609 F.2d at 1293. Second, there is no question of inconveniencing the parties by a distant forum since both fora sit in Los Angeles. Third, although *Crawford* was filed long before this action, the able trial judge who presided over *Crawford's* remedy phase since *Crawford I* was decided has recently resigned and was replaced only this year by a judge who is new to the case. Finally, the fact that *Crawford* has been pending in the state courts for 18 years is a factor which militates in favor of this Court's exercising its "unflagging obligation" rather than abstaining from it. This circumstance gives rise to the inference that the expeditious resolution of the claims made in these two cases will not necessarily be better served by dismissal of this case in deference to *Crawford.* Despite its long history, *Crawford's* ultimate resolution is far from clear. As stated earlier, *Crawford II's* remittiur may permit, if not require, a retrial of the liability phase, because of changes in the law in the 11 years since Judge Gitelson issued the writ of mandate. On such a retrial or reopening of liability, plaintiffs may seek to be relieved of their

stipulation to limit evidence on liability to the five-year period from 1963 to 1968.[11]

Based on all the circumstances, I conclude that dismissal of this case under *Colorado River* would be inappropriate. I, therefore, decline to dismiss this case in deference to *Crawford.*[12]

The Eleventh Amendment

We turn now in this and the succeeding sections to the two additional grounds raised by the State defendants for dismissal of this action against them. As stated earlier, the State defendants include Governor Edmund G. Brown, Jr., Wilson Riles, the Superintendent of Public Instruction, the California State Board of Education and the California Department of Education.

All of the State defendants contend that this action is barred by the Eleventh Amendment of the Constitution. It would serve no purpose to set forth here the history of the development of Eleventh Amendment immunity since *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). That task has recently been most ably performed by Judge Schwartz in a related case, *NAACP v. California,* 511 F.Supp. 1244, 1249-59 (E.D.Cal.1981). As Judge Schwartz noted, with respect to suits against a state agency, *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (*per curiam*), remains controlling

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[11]If this action is dismissed and if such reopening and relief are not sought or not permitted, plaintiffs here will have been deprived of the opportunity to have their constitutional claims fully presented.

[12]Nothing in *Colorado River* indicates that a declination to dismiss in deference to a state court proceeding at this early stage of the case is not subject to reconsideration upon a showing of changed circumstances. Obviously, a determination not to exercise a *Colorado River* dismissal can be based only on the circumstances as they now exist.

and under its flat ruling, even suits seeking only injunctive relief against a state agency are barred by the Eleventh Amendment. *See also, Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1977), *rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) (involving bistate agency created by interstate compact).

Under the Eleventh Amendment, therefore, this action must be dismissed as against defendants California State Board of Education and California Department of Education.[13]

Case or Controversy

It has long been held that the "case or controversy" requirement of Article III of the Constitution is jurisdictional. *E.g., Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *see NAACP v. California, supra,* 511 F.Supp. at 1259-63. To meet the "standing" requirement necessary to give rise to a case or controversy, plaintiffs must demonstrate not only injury, but also that there is a " 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978); *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48

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[13]Because the case or controversy requirement, *infra,* is dispositive as to them and because other factors not now before the Court may require consideration if an amended complaint is filed as to them and the Eleventh Amendment is again raised as a bar, it is unnecessary to and the Court declines to reach the Eleventh Amendment issue with respect to defendants Governor Brown and Superintendent Riles at this time.

L.Ed.2d 450 (1976); *Nat'l Wildlife Fed'n v. Adams,* 629 F.2d 587, 594 n.11 (9th Cir. 1980). Standing also requires that the "prospective relief will remove the harm." *Warth v. Seldin, supra,* 422 U.S. at 505, 95 S.Ct. at 2208.

In this action alleging generally that defendants have created the conditions of *de jure* segregation in the Los Angeles schools, nowhere in the complaint is there any allegation of any intentional act by either the Governor or Superintendent of Public Instruction which proximately contributed to the current segregated state of the schools. In fact, the only mention of the Governor anywhere in the complaint is the allegation that the members of the State Board of Education are appointed by the Governor.

Plaintiffs were unable to answer at oral argument what specific relief, if any, could be ordered against these defendants, were plaintiffs to prevail at trial. In fact, plaintiffs' written opposition to the State defendants' motion to dismiss is tantamount to an admission that no case or controversy exists:

> "Contrary to the assumption of the state defendants, which is incorporated as a premise to their Article III dismissal motion, plaintiffs would not immediately proceed to preliminarily enjoin the described *future* conduct of state defendants *(e.g.* reduction of appropriations in aid of desegregation) until that conduct was clearly and manifestly threatening irreparable injury to plaintiffs' class."

(Plaintiffs' Opposition to State Defendants' Motion to Dismiss, p. 14.) This admission also highlights an additional reason why no case or controversy exists as between plaintiffs and these defendants. What plaintiffs seek from the State defendants is funding in aid of desegregation. Even assuming education is a matter of

statewide concern, plenary authority over education, including funding, is constitutionally vested in the state legislature. Cal.Const., Art. IX, §§ 1 & 6.

For these reasons, I conclude that the complaint fails to state a claim against defendants Governor Brown and Superintendent Riles and that this Court lacks subject matter jurisdiction. However, because this is plaintiffs' first attempt, leave will be granted, if plaintiffs so choose, to file an amended complaint as against these defendants. In granting such leave, I am mindful that another court has reached a different conclusion on apparently similar allegations, although the Eleventh Amendment and Article III issues appear not to have been raised there. *San Francisco NAACP v. San Francisco Unified School Dist.*, 484 F.Supp. 657 (N.D.Cal.1979). Although the State defendants' altenative motion for a more definite statement has now been mooted, if plaintiffs choose to amend they should address the case or controversy requirement by specific factual allegations. In doing so, the legitimate concern of the State defendants for a more definite statement should be met.

Order

For the foregoing reasons,

IT IS ORDERED:

1. The motion to dismiss of the District defendants is denied.

2. The motion to dismiss of the defendants California State Board of Education and California Department of Education is granted without leave to amend and the action is hereby dismissed as against said defendants.

3. The motions to dismiss of defendants Governor Brown and Superintendent Riles are granted with 20 days' leave to file an amended complaint.

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 81-1811 AWT (JRx)

LOS ANGELES NAACP, ET AL.,
PLAINTIFFS,

V.

LOS ANGELES UNIFIED SCHOOL DISTRICT, ET AL.,
DEFENDANTS.

The Court, being of the opinion that its decision of July 16, 1981, involves controlling questions of law which may materially advance the ultimate termination of this litigation upon immediate appeal and as to which there is substantial ground for difference of opinion as to what the law is, certifies for interlocutory appeal paragraph 1 its order of July 16, 1981 denying the local defendants' motion to dismiss and the supporting memorandum opinion.

DATED: August 12, 1981.

/s/ A. WALLACE TASHIMA
A. WALLACE TASHIMA
United States District
Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-8113

LOS ANGELES UNIFIED SCHOOL DISTRICT;
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES;
and WILLIAM JOHNSTON, SUPERINTENDENT,
in his Official Capacity,
DEFENDANTS-PETITIONERS,

v.

LOS ANGELES NAACP;
BEVERLY HILLS-HOLLYWOOD BRANCH NAACP;
SAN PEDRO-WILMINGTON BRANCH NAACP;
WATTS BRANCH NAACP;
SAN FERNANDO VALLEY NAACP;
and CARSON NAACP,
PLAINTIFFS-RESPONDENTS.

Before: HUG and SKOPIL, Circuit Judges.

Upon due consideration the petition for permission to appeal is granted.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. CA 81-5772

LOS ANGELES UNIFIED SCHOOL DISTRICT;
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES;
and HARRY HANDLER,
SUPERINTENDENT, in his Official Capacity,

DEFENDANTS-APPELLANTS,

v.

LOS ANGELES NAACP,
BEVERLY HILLS-HOLLYWOOD BRANCH NAACP,
SAN PEDRO-WILMINGTON BRANCH NAACP,
WATTS BRANCH NAACP,
SAN FERNANDO VALLEY NAACP,
and CARSON NAACP,

PLAINTIFFS-APPELLEES.

On Appeal from the United States District Court
for the Central District of California
in Civil Action No. 81-1811 AWT

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING BY THE ENTIRE COURT

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PETITION FOR HEARING AND SUGGESTION FOR REHEARING BY THE ENTIRE COURT

Appellants Los Angeles Unified School District, Board of Education of the City of Los Angeles and Harry Handler, the Superintendent of Schools (collectively the "District"), apply, pursuant to Rule 35(b), Federal Rules of Appellate Procedure, and Rule 25 of the Rules of this court for a rehearing of this appeal by the entire court. This application is made because the majority opinion of the limited en banc panel is internally inconsistent, misapplies applicable law, and misapprehends facts in the record. Rehearing by the entire court is appropriate because of the importance of this case and of the issues presented by this appeal.

The majority opinion correctly holds that res judicata bars relitigation in this action of de jure segregation claims that arose before the conclusion of the original state court trial in *Crawford v. Board of Education.* It errs, however in concluding that federal and California state law did not require the *Crawford* plaintiffs to litigate or abandon claims of de jure segregation arising between 1969 and 1981, and in failing to recognize that the *Crawford* plaintiffs actually did litigate de jure segregation claims which arose as late as April 1981. If on rehearing the court corrects either of these errors, res judicata must be held to bar relitigation of de jure claims arising before September 10, 1981.

I

THE MAJORITY OPINION IS INTERNALLY INCONSISTENT

The majority writes,

> "If the *Crawford* plaintiffs had actually litigated the liability of the District for segregative acts occurring after May 2, 1969, then the res judicata bar would have to encompass those events and others that might have been litigated with them. The record indicates, however, that the *Crawford* plaintiffs did not so open the litigation to later events." p. 14, ls. 8-14.

In contrast, the same opinion states,

> "In further pursing [sic] their relief after the remittitur in Crawford II, [the *Crawford* plaintiffs] had vigorously litigated the question whether the Board's resolution of March 16, 1981, abandoning mandatory desegregation measures was an act of de jure segregation." p. 27, ls. 17-21.

This later language, which unlike the earlier passage is supported by the record (*see* Section III, *infra*), demonstrates that the *Crawford* plaintiffs did indeed allege new acts of de jure segregation during the so-called remedy proceedings. Since "the Crawford plaintiffs had actually litigated the liability of the District for segregative acts occurring after May 2, 1969, then the res judicata bar would have to encompass those events *and others that might have been litigated with them.*" (*Id.* at 14; emphasis added.)

II

THE MAJORITY OPINION MISAPPLIES APPLICABLE LAW

The majority holds that the bar of the *Crawford* litigation cannot extend beyond May 2, 1969, when the first trial before Judge Gitelson concluded. This is justified by a purported rule in California that the "scope of litigation

is framed by the complaint at the time it is filed." (p. 13.) Specifically, the majority concludes that the claims barred by *Crawford* are defined by the original complaint filed in 1963, as supplemented by the parties' stipulation to consider events from 1963 to the close of the first trial in May 1969. (*Id.*) According to the majority, claims arising after May 1969 are not barred because in California claim preclusion "does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated." (*Id.*)

Judge Sneed's partial dissent[1] notes that the District's Application for Modification of Orders must under California law "be construed as a supplemental pleading that put at issue the question of whether any acts of *de jure* segregation occurred up until the final disposition of that motion." (Sneed at 5.) The District's application was filed November 15, 1979, the the 14th day of Superior Court hearings that continued until April 1980. With the existence of de jure segregation placed in issue and an ample opportunity to present evidence, the *Crawford* plaintiffs were required to litigate or abandon their federal claims. *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 102 S.Ct. 1883 (1982), *Boccardo v. Safeway Stores, Inc.*, 134 Cal.App.3d 1037, 184 Cal.Rptr. 903 (1982).

More fundamentally, the majority's conclusion is based on a decidedly incorrect reading of California law. While the rule relied upon by the majority may apply in some actions at law, California courts have made it abundantly

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[1]The District believes that Judge Sneed's analysis is entirely correct and would require preclusion of all pre-1981 de jure claims even if the *Crawford* plaintiffs had made no effort to litigate those claims.

clear that equitable proceedings such as *Crawford* are governed by entirely different principles.

In *Pailhe v. Pailhe,* 113 Cal.App.2d 53, 64, 247 P.2d 838 (1952), the court described the difference in the principles governing actions at law and actions in equity as follows:

> " 'It is one of the firmly established rules of equity that the court will, in one action, grant all the relief to which the parties are entitled, although at law such a result might strictly require several actions.' [citation] Here the court in one action gave relief which it might have given in the two actions. 'It is the policy of the law to allow a party to obtain in one action all the relief to which he may be entitled on account of a single transaction, although such relief may be of a character that would require several suits under the strict rules relating to the forms of common-law actions prior to the adoption of the codes.' [citation] Here was a proper situation for the application of the rule that where equity has acquired jurisdiction for one purpose it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the causes of action presented."

Accord, Bruce v. Gregory, 65 Cal.2d 666, 670-73, 56 Cal.Rptr. 265, 423 P.2d 193 (1967) (In an action on a petition for writ of mandate, "[o]nce the court reaches the merits of the case, it should consider all relevant facts, regardless of when they come into existence.").

In California, equitable powers are so broad that the pleadings do not rigidly define the court's functions, as the majority seems to believe. Instead, as the court held in *Coons v. Henry,* 186 Cal.App.2d 512, 519, 9 Cal.Rptr. 258 (1960), California law requires a court to resolve all

matters before it in order to preclude further litigation on the same subject.

> "It is a cardinal rule of equity practice that under a prayer for general relief the court may grant any relief conformable to the case made by the pleadings and the evidence, although it may not be the relief asked by a special prayer. This rule is based upon the fundamental principle of chancery that a court of equity will endeavor to finally dispose of litigation so as to preclude further litigation between the same parties and upon the same subject matter. [citation] It is also an accepted rule that when a party comes into a court of equity pleading facts which entitle him to some equitable relief, the court will assume jurisdiction of the entire controversy, notwithstanding the form of the pleading, and will disregard the specific prayers in order to grant relief which the proof warrants as within the equities of the entire case. [citation]

The majority's analysis places great importance upon supplemental pleadings as the necessary vehicle for litigating claims arising after commencement of an equitable lawsuit. This, too, is an entirely incorrect view of California law. As the court explained in *Collins v. Sargent*, 89 Cal.App. 107, 112-113, 264 P. 776 (1928), a court exercising equitable powers must afford relief based upon the facts that exist at the close of the litigation, whether or not a supplemental pleading has been filed:

> "The general rule, to which there are exceptions, is that in actions at law the right to judgment depends upon the facts as they exist at the commencement of the action, but such is not the rule in equity. The relief administered in equity is such as the nature of the case, and the facts as they exist at the close of the

> litigation, demand; and supplemental complaints are not required in actions in equity in order to bring before the court those facts and circumstances occurring since the filing of the original complaint, which bear as evidence upon the facts in issue in the original cause. It would be surplusage if they were set up in a supplemental pleading, and equity does not require a useless thing."

Accord, Hutcherson v. Alexander, 264 Cal.App.2d 126, 136, 70 Cal.Rptr. 366 (1968); *Schaefer v. Berinstein,* 180 Cal.App.2d 107, 134, 4 Cal.Rptr. 236 (1960).

As these cases demonstrate, once the District questioned the existence of contemporaneous de jure segregation, the superior court was under an obligation to resolve that issue as well as all others before it. *Crawford* therefore bars relitigation of all de jure claims arising prior to the conclusion of the state court proceedings on September 10, 1981.

III

THE MAJORITY OPINION MISAPPREHENDS FACTS IN THE RECORD

The majority opinion recognizes that "if the *Crawford* plaintiffs had actually litigated the liability of the District for segregative acts occurring after May 2, 1969, the the res judicata bar would have to encompass those events and others that might have been litigated with them." (p. 14) The record establishes that the *Crawford* plaintiffs did indeed litigate allegedly segregative acts occurring in 1980 and 1981.

After the District filed its Application for Modification of Orders, the trial court asked for briefs and continued the taking of testimony. In early January 1980, counsel

for intervenor Integration Project was cross-examining Theopolis Kimbrough, at that time the District's Director, School Building Planning, with respect to the use of temporary bungalow classrooms on the campuses of overcrowded schools. When the court asked whether the *Crawford* plaintiffs contended that the District's use of portable classrooms constituted contempt of Judge Gitelson's order forbidding new school construction in minority areas, Joseph Duff, counsel for the *Crawford* plaintiffs (and for appellees here) declined to pursue contempt proceedings against Mr. Kimbrough. However, Mr. Duff continued:

> "MR. DUFF: Your Honor, in all candor with the court, we have been, from the beginning of these proceedings, alleging that the Board has continued its pattern of de jure segregation.
>
> * * *
>
> "...we have been, from the beginning, stating objections to the plan with respect to the continuing existence of de jure conduct. This is one example of that."
>
> *Crawford* reporter's transcript at 6457, ls. 3-5 and 18-20.[2]

Plaintiffs could have raised their objections to the use of portable classrooms on minority school campuses by contending that such use violated Judge Gitelson's May 12, 1970, order. Instead they elected to assert — undoubtedly with an eye to Proposition I and the District's application

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[2]The District requests that this court take judicial notice of the quoted portion of the *Crawford* transcript, a copy of which is annexed to this application as Exhibit 1.

to modify — that the use constituted continuing de jure conduct.

After the hearings before Judge Egly concluded, the *Crawford* plaintiffs submitted proposed findings of fact and conclusions of law with respect to the applicability of Proposition I. The proposed findings and conclusions, which the trial court adopted without significant change, relied primarily on Judge Gitelson's May 12, 1970, determination of de jure violations by the District, but — significantly — also concluded that the District had been kept de jure segregated between 1970 and 1980. (C.T. Tab 7 at 39-41.)

Nearly a year later, after the *Crawford II* remittitur was filed, the Board of Education voted on March 16, 1981, to remove the mandatory aspects of the court-imposed plan and to permit formerly-bused students to return to their neighborhood schools. The *Crawford* plaintiffs filed a motion for preliminary injunction to enjoin implementation of the March 16 resolution. The majority opinion misconstrues that motion:

> "After the remittitur, plaintiffs contended in the trial court that the Board resolution of March 16, 1981, was unconstitutional, but again on the ground that it violated the mandates of *Crawford I* and *II*. The unconstitutionality of the Board resolution was urged not as a new source of liability, but as a ground for holding the Board's plan to be improper as relief."[3]
>
> *Id.* at 15, ls. 5-11.

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[3]It is difficult to reconcile this language with the opinion's later characterization of the same contention, quoted at page 2, *supra*.

It is true that the *Crawford* plaintiffs contended that the March 16 resolution violated the mandates of *Crawford I* and *Crawford II*. Those were, respectively, the second and third contentions made in support of plaintiffs' motion. Their principal contention, however, was that "THE MARCH 16 RESOLUTION AND ITS EFFECTUATION IS DE JURE SEGREGATION." (C.T. Tab 7 at 81; emphasis in original.) As authority for this assertion, the *Crawford* plaintiffs relied on two 1979 United States Supreme Court cases, *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, and *Columbus Board of Education v. Penick,* 443 U.S. 449, 99 S.Ct. 2941. Their argument reads as follows:

> "The May 16, 1981 action by the members of the Board who voted for it and their effectuating or seeking to effectuate the Resolution without court approval may well be in contempt of this court. But whether it is or not, the Resolution is an affirmative act of intentional segregation. The board members knew that those acts would result in now integrated schools becoming minority segregated schools and they intended that result. This is blatant de jure segregation. *Dayton Board of Education v. Brinkman* Dayton II), 443 U.S. 526 (1979); *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979). The pious 'reaffirmation' of 'its commitment to the goal of an integrated school district' (Exhibit A to Okrand Declaration) cannot obliterate the intent.
>
> "This conduct by the Board goes even further than that admonished against by the California Supreme Court in *San Francisco Unified School District v. Johnson,* 3 Cal.3d 933 (1971) where it said (pp. 958):
>
> Once the state undertakes to preserve so-called de facto school segregation; or to hamper its removal,

> such state involvement transforms the setting to one of de jure segregation.
>
> The Board's action not only undertakes to preserve de facto segregation and to hamper its removal; it affirmatively seeks, and will unless restrained by this Court, institute segregation where none, or supposedly none, now exists. It is to be recalled that the Board is not doing this resegregation because it *has* to; it is doing so because it *wants* to. Proposition 1 specifically exempted school boards from its interdict. There could hardly be a more intentional act of segregation than what the Board is doing."
>
> *Id.* at p. 16, l. 24, to p. 18, l. 1 (emphasis in the original, footnote omitted).

Plaintiffs could not have alleged de jure segregation more clearly. Nor could it be more obvious that the alleged de jure violation was a "new source of liability," based on contemporaneous conduct which was vigorously asserted in *Crawford* before the trial court, the Court of Appeal and the California Supreme Court. (C.T. Tab 7 at 121, 131-35, 152, 171 and 190-94.)

IV

CONCLUSION

This is an important case. Its significance has already caused this court to hold a Saturday hearing on one day's notice to review a temporary restraining order issued the day before, to issue a written opinion within hours of that hearing, and to convene en banc to consider this interlocutory appeal. Its significance is partly economic. Since Proposition I passed, the District's integration budgets have totalled more than $900,000,000. But its principal significance is whether the District, whose charge is

educating 565,000 students, must repeat in federal court the final 12 years of the *Crawford* litigation.

The majority concludes that those 12 years must be re-examined because the *Crawford* plaintiffs could and did elect not to litigate claims of de jure segregation arising after May 2, 1969. For reasons clearly explained in Judge Sneed's partial dissent and in Section II of this petition, the *Crawford* plaintiffs were required to litigate those claims once the District applied for modification of the trial court's mandatory busing orders. As we have shown and as the majority opinion recites, the *Crawford* plaintiffs *did* litigate claims of de jure segregation in the state court as recently as April 1981.

Rehearing should be granted because the court's en banc opinion appears on its face to permit the relitigation in federal court of de jure segregation claims actually made in state court. Plaintiffs undoubtedly could have pursued those claims more vigorously in 1980 and 1981 in the state court, but they chose not to do so. However, the fact that plaintiffs pursued those claims at all bars their relitigation in this action.

DATED: January 4, 1985.

Respectfully submitted,
G. WILLIAM SHEA
PETER W. JAMES
MICHAEL M. JOHNSON
McCUTCHEN, BLACK, VERLEGER & SHEA

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Attorneys for Defendants-Appellants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 3 HON. PAUL EGLY, Judge

MARY ELLEN CRAWFORD, ETC., ET AL.,
PETITIONERS,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

No. C 822 854

RESPONDENTS

REPORTERS' DAILY TRANSCRIPT

Wednesday, January 9, 1980

VOLUME 43

Pages 6,385 thru 6,475, Incl.

Appearances: (See Volumes 1 and 2)

HERBERT R. CANNON, CSR #1923
and
NANCY L. HARRIS, CSR #644
Official Reporters

THE COURT: I am inclined to agree with your position. Mr. Duff?

MR. DUFF: Your Honor, in all candor with the court, we have been, from the beginning of these proceedings, alleging that the Board has continued its pattern of de jure segregation.

THE COURT: I have no problem with bad faith. I have indicated in the past that the question of bad faith can be tried right along with the question.

But I have never indicated that I am going to dispense with any formal notice of contempt. And I do not intend to.

This is a semi-criminal proceeding at that point. And it takes on a brand new different type of proceeding. And I don't intend to try this case without that particular issue being handled in the proper manner.

MR. DUFF: I am not the questioner; so I don't know what Miss McKinsey's intent is as to contempt.

But we have been, from the beginning, stating objections to the plan with respect to the continuing existence of de jure conduct. This is one example of that.

THE COURT: I have no problem with that.

But the problem is when she asks the question which she asked as to whether or not in his opinion there is a violation of that order, that is something else. That is an all together different proposition.

MISS McKINSEY: The objection to that question was sustained.

THE COURT: But you are going right back down to it again.

PROOF OF SERVICE BY MAIL

I, the undersigned, say: I am and was at all times herein mentioned a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within action; that my business address is 600 Wilshire Boulevard, Los Angeles, California; that I am employed in the office of McCutchen, Black, Verleger & Shea by a member of the Bar of this Court at whose direction the service mentioned herein below was made.

On January 4, 1985, I served upon each of the persons named below a copy of the document to which this declaration is appended by depositing the same in a mail box or like facility regularly maintained by the Government of the United States at Los Angeles, California, enclosed in sealed envelopes with postage thereon fully prepaid addressed respectively as follows:

Joseph H. Duff, Esq.
4401 Crenshaw Blvd., Suite 311
Los Angeles, CA 90043

Thomas I. Atkins, Esq.
NAACP Special Contribution Fund
186 Remsen Street
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Hon. A. Wallace Tashima
United States District Court
312 North Spring Street
Los Angeles, CA 90012

Gordon R. Overton, Deputy
Attorney General
3580 Wilshire Blvd. Suite 800
Los Angeles, CA 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 4, 1985, at Los Angeles, California.

JUNE SCHMEIER

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 81-5772

LOS ANGELES BRANCH NAACP ET AL.,
PLAINTIFFS-APPELLEES,

V.

LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL.,
DEFENDANTS-APPELLANTS.

Order Modifying Opinion and Denying Petition for Rehearing by the Full Court

Before: Chief Judge BROWNING, Judges CHOY, WALLACE, SNEED, ANDERSON, PREGERSON, POOLE, NELSON, CANBY, BOOCHEVER and NORRIS, Circuit Judges:

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing by the full court.

The full court has been advised of the suggestion for rehearing by the full court and no judge of the court has requested a vote on it.

The following modifications are made to the opinion:

1. A new footnote 9 will be indicated at slip op. 5635, left column, at the end of the last full sentence (ending "that plaintiffs do so."). The footnote will read:

> 9. In equity, a court in fashioning its decree may take into account facts occurring after the filing of the complaint, and no supplemental pleading is required. *Collins v. Sargent,* 89 Cal. App. 107, 112-113, 264 P. 776, 779 (1928). While that rule may often accomplish the purpose of avoiding further litigation,

> we view its primary function as one of insuring realistic relief. *See* note 10, *infra*. We have been referred to no cases where the rule was extended to bar subsequent litigation of claims that arose during previous litigation but were not made the subject of supplemental pleadings. We decline to impose a potentially unworkable requirement that every claim arising prior to entry of a final decree must be brought into the pending litigation or lost.

2. The sentence at slip op. 5636, lines 5-10, will be amended to read:

> After the remittitur, plaintiffs contended in the trial court that the Board resolution of March 16, 1981, was unconstitutional, by its own force and because it violated the mandates of *Crawford I* and *II*.

3. Existing footnote 15 will be deleted.

In connection with the above changes, footnotes 9 through 14 will be renumbered.

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV. 81-1811 AWT (JRx)

LOS ANGELES NAACP,
BEVERLY HILLS-HOLLYWOOD NAACP;
SAN PEDRO-WILMINGTON NAACP,
WATTS NAACP,
SAN FERNANDO VALLEY NAACP,
and CARSON NAACP,
PLAINTIFFS,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE
CITY OF LOS ANGELES, WILLIAM J. JOHNSTON,
SUPERINTENDENT OF SCHOOLS,
In his Official Capacity,
CALIFORNIA STATE BOARD OF EDUCATION, CALIFORNIA
DEPARTMENT OF EDUCATION, WILSON RILES,
SUPERINTENDENT OF PUBLIC INSTRUCTION,
In his Official Capacity,
and EDMUND G. BROWN, JR., GOVERNOR,
In his Official Capacity,
DEFENDANTS.

First Amended Complaint for Violation
of Civil Rights

INTRODUCTION

1. This is a class action for declaratory and injunctive relief, brought to redress rights, privileges and immunities guaranteed by the Constitution and laws of the United States and the State of California, specifically the right to equal educational opportunity free from racial discrimination and segregation.

2. The Los Angeles and State defendants and their predecessors acting in concert with one another pursuant to state "law" and acting independently "under color of State law", created a *de jure* racially dual system of schools which was in place and operation at the time of the land mark Supreme Court decision in *Brown v. Board of Education,* 347 U.S. 438 (1954). These defendants deliberately chose to ignore their duty under the *Brown* decision, in that they failed to take the affirmative action necessary to dismantle this dual system, but rather chose to deliberately and intentionally perpetuate and expand the unlawful racial segregation they had earlier created within the Los Angeles Unified School District.

3. Notwithstanding the intervention of the State of California Courts to end the dual system established by these defendants, the defendants have resisted each and every effort by judicial authorities to dismantle racial segregation and to end the pervasive racial discrimination practiced within the LAUSD. Indeed, in the annals of school desegregation law, there may be no equal to these defendants in the dogged determination with which they have sought to defend segregation and discrimination at all costs, with total disregard of the educational or psychological costs to the minor children in their charge, or the financial and social and economic cost to the city of Los Angeles and its environs. Even today those efforts continue.

II

JURISDICTION AND VENUE

Jurisdiction

4. Jurisdiction of this Court is invoked under the First, Ninth, thirteenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. 1981, 1983, 1988

and 2000d; 28 U.S.C. 1331; 1343(3) and (4); and 20 U.S.C. 2201 and 2202. Pendent jurisdiction of this Court is also invoked to enforce plaintiffs' rights under the Constitution and pertinent laws of the State of California. The matter in controversy exceeds $10,000, exclusive of costs and interests.

Venue

5. Venue for this cause is properly vested in this Court, all the plaintiffs and all the defendants being within the reach of the Court as provided under the F.R.C.P.

III

THE PARTIES

Plaintiffs

General

6. Plaintiffs are the NAACP, a 72-year old civil rights organization on behalf of its members, and each of them, and on behalf of all those persons similarly situated, pursuant to F.R.C.P. 23.

7. Plaintiffs' class is composed of 11 black school children attending the public schools of the Los Angeles Unified School District, elementary and secondary, and who, absent the intervention of this Court will be required to attend schools made racially segregated by the actions of local and state school officials in violation of the Constitution and laws of the United States and the State of California.

The Branches of the NAACP

8. The National Association for the Advancement of Colored People is the nation's oldest, largest and best-known civil rights organization with branches and affiliates in all fifty states, including six within the Los Angeles metropolitan area. The NAACP was founded in 1909 to confront and combat and eradicate the causes of racial discrimination and racial segregation, whether in the public school, public housing, public or private employment, in the receipt of public services, in the use of public accommodations, in the voting booth, in the various segments of our law enforcement and judicial systems, in higher education, military service, and allocation of public funds and other resources. The NAACP's involvement with school segregation and desegregation predates and produced the 1954 Supreme Court decision, the NAACP has been the prinicipal vehicle for bringing recalcitrant non-Southern public school officials to the bar of constitutional justice, having most recently filed, prosecuted and participated in the landmark Supreme Court decisions affecting Detroit *(Milliken v. Bradley,* 433 U.S. 267 (1977)), Columbus *(Columbus Bd. v. Penick,* 443 U.S. 449 (1979)), and Dayton *(Dayton B. v. Brinkman,* 433 U.S. 406 (1977)); *Dayton Bd. v. Brinkman*, 443 U.S. 526 (1979).

9. The LAUSD covers an extensive geographical area, an area which is represented by six different NAACP Branches — Los Angeles, Beverly Hills, Hollywood, San Pedro-Wilmington, Watts, San Fernando Valley and Carson. Each of these Branches sues on behalf of its members and their children who are now attending, or are entitled to attend, the public schools maintained and operated in a segregated fashion at the present time by the LAUSD. These Branches also sue on behalf of all others similarly situated-parents and children who, but

for the unlawful discrimination and forced segregation policies and practices of the LAUSD, would enjoy equal educational opportunity.

Defendants

Local Defendants

10. The Los Angeles Unified School District (hereinafter LAUSD) is the public school district created by the State of California to provide educational services and programs to children required by the provisions of California law to attend school certified by the State for a minimum period of time, as determined from time to time by the State. (California Education Code §§ 35010, 35012, 35014)

Board of Education of the City of Los Angeles

11. The Board of Education of the City of Los Angeles is the body politic created by the State of California to establish policies for the operation of the LAUSD, including policies concerning assignment of students, hiring of faculty and staff, construction and maintenance and operation of school facilities, drawing of attendance boundaries, establishment of grade structures and feeder patterns, determination of policies covering granting of student or staff or faculty transfers, development of educational program, allocation of financial resources available from time to time from local, state or federal sources. (California Education Code §§ 35010, 35012, 35014).

12. The Board of Education is elected by the qualified voters within Los Angeles, and is comprised of 7 members, each of whom serves for 4 years or until a successor

is sworn. The Board, once elected, chooses its own officers, usually consisting of a President and Vice-President, and is internally organized into several committees to process the matters coming before the Board of Education. The Board also is empowered to select a Superintendent and such other necessary subordinate administrative personnel as it and the Superintendent may agree upon, with such salaries as may be decided. (California Education Code §§ 35020, 35022, 35024, 35026)

13. Defendant William J. Johnston is the Superintendent of the LAUSD chosen by the Board to carry out the policies of the Board through procedures created by the Board or mandated by law, including assignment of students and faculty and classified staff, determination of school attendance boundaries, approval of pupil transfers, determination of use of the District's facilities, determination of the District's educational programs, allocation and expenditure of the District's financial and other resources, hiring of staff and faculty. The Superintendent or his legal successor in office is sued in his official capacity.

State Defendants

State Department of Education

14. The California State Department of Education, established pursuant to California statutes, is the state administrative agency through which the Superintendent of Public Instruction, as Director of Education, and the State Board of Education, and other inferior state employees, and officers of the Department, administer and enforce all the policies, procedures and laws relating to public schools. (Education Code §§ 33300 et seq.) "The department is the collective term which describes the entire state school system, in so far as the law provides for the state, as distinguished from local administration

of school affairs." (1 Ops. Cal. Atty. Gen. 36) "The term 'system' itself imports a unity of purpose, as well as an entirety of operation." *San Francisco v. Hyatt*, 163 Cal. 346, 125 Pac. 751.

15. The State Board of Education is the ultimate governing and policy determining body of the Department. (41 Ops. Cal. Atty. Gen. 105) The Director of Education is the executive and chief administrative officer of the department. "The relative positions of the director and board are not unlike the relationship between the executive head of a corporation and its board of directors." (1 Ops. Cal. Atty. Gen. 36) The State Department of Education was created in 1921, then succeeding to many of the powers and functions previously vested in the State Board of Education.

State Board of Education

16. The State Board of Education of the State of California is the entity created by the Constitution and laws of the State of California to carry out the education responsibilities and policies for a common state school system, as they have existed from time to time. (Cal. Const. Art. 9, § 7, Education Code § 33000 et seq.) It is an entity capable of suing and being sued. The State Board is presently comprised of 10 members, each appointed to serve a 4 year term by the Governor pursuant to state law provisions. (Education Code § 33000 et seq.) Under early state school laws, from at least 1852, both the Governor and the State Superintendent of Public Instruction, among others, were members of the State Board of Education, the Governor acting as the President and the Superintendent as the Secretary. This practice continued at least through 1912. Three of the members of the State Board are civil executive officers. (Cal. Government Code § 1001) The State Superintendent of Public Instruction is

the secretary and chief executive officer of the Board. (Education Code § 33004).

17. The State Board is legislatively empowered to establish policies and procedures to carry out its lawful duties in providing for a system of common schools, including the general duty to see that all children receive educational programs and services in accordance with the Constitution and laws of the United States and the State of California. (Cal. Education Code §§ 33030, 33031). The State Board has formulated and enforced its policies through the conference by the legislature of the general power "to adopt rules and regulations not inconsistent with the laws of this State ... for the government of public schools." Other powers vested in the State Board of Education, which have been and may be exercised by it, include, but are not limited to:

a. Adopting rules and regulations not inconsistent with state law, for the government of all schools receiving, in whole or in part, financial support from the state;

b. Selecting, adopting, and providing state textbooks;

c. Conducting studies of educational conditions and needs of the state;

d. Making plans for the improvement of the administration and efficiency of state public schools;

e. Formulating and expressing its own views on legislation;

f. Requiring the development, submission and approval of school desegregation plans by school districts;

g. Recommending changes in laws or new educational legislation to legislature;

h. Developing guidelines for teacher evaluation;

i. Developing policies for equal employment practices in school districts;

j. Making rules for approval of contracts by local school districts with federal agencies;

k. Making rules for approval of plans for construction of certain school buildings;

l. Making rules for compensatory education and other categorical aid programs;

m. Making rules for school district reorganization;

The State Board of Education is also the principally designated state education agency for applying for and for directing the allocation and apportionment of federal funds to local education agencies under various federal programs of aid to education. (Education Code § 12000 et seq.)

Superintendent of Public Instruction

18. The defendant, Wilson Riles, is the State Superintendent of Public Instruction, elected for a term of 4 years. The State Superintendent of Public Instruction, a constitutional officer, is the chief executive and administrative officer for the State Board of Education, in which capacity he is also the chief administrative officer for the State Department of Education being sued in his official capacity. (California Education Code §§ 33112, et seq.) As such, the Superintendent presently is the officer responsible for execution implementation of the policies and procedures of the State Board of Education, as embodied in its rules and regulations. He may also communicate his own views on various educational matters, including legislation. (41 Ops. Cal Atty. Gen. 105, 114).

19. From at least 1852 and continuing until 1912 the Superintendent was a member and Secretary of the State Board of Education, and as a result, created, encouraged and executed educational policy for the state school system, including the authorization and operation of racially separate schools and other racial discrimination. Since at least 1921, the Superintendent has acted as the Director, through the State Department of Education and, as the executive, through the State Board, to perpetuate and expand the state system of racially dual schools, never effectively acting to dismantle the system of racial segregation put into operation by previous policies and practices developed and encouraged in part, by the Superintendent and administered by that office.

20. In his capacity as Director of Education, the Superintendent also is empowered to formulate and execute regulations with regard to administration and allocation of contracts with the federal government, including the certification of compliance with federal law under contracts carried out by local educational agencies and certification that local districts are complying with relevant portions of the state's minimum educational provisions and criteria and with federal law.

The Governor

21. The defendant Edmund G. Brown, Jr., is the Governor of the State of California, elected for a term of 4 years. The Governor, as a constitutional officer, is the supreme executive officer of the state government. (Const. Art. 5, § 1 et seq., Govt. Code § 12000 et seq.) The Governor exercises a power of appointment over the members of the State Board of Education and was, prior to 1912, a member and President of the State Board of Education. The Governor has a general duty to see that the laws are faithfully executed, including state and

federal laws concerning equal education opportunity. (Const. Art. 5 & 7). As such, he has supervisory authority over the official and ministerial officers of the state. (Govt. Code § 12010). The Governor has a responsibility to report to the legislature on the condition of the State and each year he submits a budget message to the Legislature, proposing programs and budgets necessary to meet the conditions and needs required to carry out important state functions, including public education. In his capacity to veto or affirm legislation, he exercises plenary authority, including the power to veto specific line item expenditures proposed by the legislature in its budget authorization. Accordingly, the Governor is an important leader in assuring that plaintiffs and other children in the Los Angeles school district are fully afforded their rights under the California and Federal law.

Class Action Allegations

22. Plaintiffs allege that all of the state and local defendants have acted and do now act under color of state law.

23. As provided by Federal Rules of Civil Procedure, Rule 23, plaintiffs bring this action as class action, suing on behalf of their members and their children and on behalf of all other minor black children now or in the past attending or with the right to attend the public schools operated by the Los Angeles Unified School district. Rule 23 §§ (a), (b) (2) and (b) (3) authorizes class actions where the claims of the parties sought to be represented by the class are similar in nature, where the people within the class are too numerous to be individually joined as parties, where the relief being sought is substantially similar as to all members of the class, where the public interests indicate that maintenance of a class action

would be the most equitable and efficient manner by which to proceed, and that the attorneys representing the class are competent so to proceed.

24. The class sought to be represented consists of over two hundred thousand black children residing in the Los Angeles Unified School District's boundaries, eligible to attend the elementary, junior high or middle, and senior high schools under the guarantees of the United States and California Constitutions that they not be denied equal protection of the laws. Joinder of this many plaintiffs is clearly infeasible. The class sought to be represented seeks similar relief — that they be accorded their full constitutional rights and that they not be subjected to any of the badges or indicia of slavery which gave rise to the 19th Century Civil Rights Amendments and the several statutes enacted pursuant to them or the various federal regulations promulgated to implement those statutes. The claims made and relief sought by the members of the class, both as to the local and state defendants, whether under state or federal constitutional or statutory provisions, are substantially similar within the meaning of Rule 23. Where the issues raised and the relief sought are, as here, so similar, judicial economy dictates class action be the vehicle used. Where the claims raised and the allegations made, as here, go so thoroughly to the heart of the basic rights, privileges and entitlements of the plaintiff class. the public interest in seeking the fullest and most equitable provision of constitutional rights weighs heavily in favor of such an action being pursued on a class action basis.

25. The attorneys representing the plaintiff class are each experienced sufficiently to adequately prosecute this action and represent the interests asserted. The NAACP Special Contribution Fund, through its General Counsel and staff, is actively involved in school desegregation

cases in state and federal courts in all regions of the country, at all levels, in every federal circuit, as well as before the United States Supreme Court and various State Supreme Courts at this very moment. Plaintiffs' attorneys are actively involved in several cases presently pending before the California State Courts.

26. The Court may be assured that the plaintiffs' claims will be vigorously prosecuted and that the plaintiffs' rights and interests will be asserted and protected with vigor and skill and knowledge. Finally, Plaintiffs' counsel are familiar with the rules and procedures of the federal courts. Plaintiffs' claim for class action standing is based soundly upon both the applicable legal standards and upon the controlling facts and realities.

IV

CAUSE OF ACTION

A. Pre-Brown State-Imposed School Segregation

27. From the earliest days of public education in the State of California, public action and state laws were used and administered to divide school children on the basis of race.

28. The state school laws of 1851 and 1853 provided that state school funds were to be distributed on the basis of the number of school age children in the particular districts.

29. In 1853, the school laws were amended to provide that such state school funds were to be distributed on the basis of the number of white school age children in the districts.

30. By 1863, state school laws had again been amended to provide that under no circumstances were

"Negroes, Mongolians and Indians" to be admitted to the regular public schools, and the State Superintendent of Public Instruction was directed and empowered and did so exercise and threaten to exercise, to withhold funds from any school district which failed to comply with this state directive. The 1863 amendments permitted, but did not require, districts to establish separate schools for the education of "Negroes, Mongolians and Indians" and provided that public funds could be apportioned for such separate public schools.

31. The 1864 school law amendments required, for the first time, the establishment of separate schools for non-whites, upon the written application of the parents or guardians of ten or more non-white children.

32. In 1866, state school laws were changed to coincide with the passage of the Fourteenth Amendment and the 1866 Federal Civil Rights Act. The 1866 change made the separation of whites from non-whites permissive, but no longer required, so long as a majority of the parents of white children attending such a school did not object in writing.

33. In 1870 and 1872 additional changes were made to state school laws. These changes gave discretionary power to local districts to set up segregated schools for Indian and black children upon the application of 10 or more parents of such children, and totally excluded Chinese children from the public schools.

34. Responding to a challenge of black parents to the state-imposed public school segregation, the California Supreme Court, in *Ward v. Flood,* 48 Cal. 42 (1847), upheld the right of a San Francisco Principal to deny blacks entry to the "white" school so long as "colored" schools were available. By the time of this California precursor to the 1896 U.S. Supreme Court decision in

Plessy v. Ferguson, 163 U.S. 537 (1896), there were at least 21 separate "colored" schools in the State of California, including at least one such school in Los Angeles.

35. The state-imposed public school segregation, supposedly, came to an end with the 1880 amendments to the school laws, which required that "schools must be open for the admission of all children". This 1880 change was validated by an 1890 State Supreme Court decision, *Wysinger v. Crookshank,* 82 Cal. 593, declaring that "the power to establish separate public schools for children of African descent has been taken away from the Boards of Trustees and Boards of Education."

36. Notwithstanding the 1880 amendments and the 1890 State Supreme Court decision, Chinese children were still being denied admission to public schools in San Francisco otherwise attended by white children. *Wong Him v. Callahan,* 119 Fed. 376 (1903). Japanese children in San Francisco were not permitted to attend schools with white children as late as 1906, because of the provision of Section 1662 of the State school laws requiring Chinese and/or Mongolian children to attend separate schools wherever such were established. Diplomatic intervention by President Theodore Roosevelt resolved the immediate San Francisco problem in 1907, skirting the whole question of whether Japanese children were properly classifiable as Mongolians and subject to the segregation laws. This issue was resolved by the 1921 State law which specifically named Japanese children as subject to the segregation laws which barred Chinese and Mongolian children from white schools where separate schools existed for them.

37. Mexican children were subjected to official public school segregation until a 1946 federal court decision, *Mendez v. Westminister,* 64 F.Supp. 544, led to the 1947

state law repealing the remaining public school segregation laws on the books, Sections 8003 and 8004 of the Education Code.

38. As a result of the state-required and imposed public school segregation until the 1947 repeal, non-white children in the State of California were massively segregated in virtually every public school district in the state, including Los Angeles, at the time of the 1954 U.S. Supreme Court decision in *Brown v. Board of Education, supra.* At no time subsequent to the 1947 repeal, or the 1954 Supreme Court decision, did the State of California require its school districts to take effective action to actually dismantle the prevasive dual system of public education created "under color of state law". Thus, at the time of the 1954 *Brown* decision the Los Angeles public schools continued to exhibit the pattern of systemic, systematic and intentional racial segregation envisioned by the state's segregation laws. This segregation forcibly separated blacks in black schools, Mexicans into Mexican schools, and whites into white schools, a pattern which exists to this very day in the LAUSD. To a lesser extent, but also true, the state segregation laws led to the existence of the segregated schools now attended by Chinese and Japanese children in the LAUSD. This failure on the part of the State of California to dismantle the system of segregated schools earlier required by its explicit statutes rendered public school segregation in Los Angeles legally indistinguishable from that type dual system which existed in the states of the deep south at the time of the 1954 U.S. Supreme Court *Brown* decision. As will be seen below, not only was the dual system not dismantled after 1954, it was expanded by the use of myriad techniques by the public officials charged with educational responsibility.

B. Pre-1970 School Segregation of the Local Defendants

39. Plaintiffs allege that, on information and belief, from 1850 through 1970 the local defendants violated the rights of plaintiffs and the members of the class they represent in that they adopted policies and engaged in practices which created and maintained a racially dual system of schools within the Los Angeles Unified School district by, among other means:

a. Constructing schools at a time and in a place such that residential segregation known by these defendants to have been existing was incorporated into school operations with the result that school buildings were built on sites which pre-determined them to open as racially segregated;

b. Building additions to existing schools such that, with the full knowledge of these defendants, racial segregation was either created, maintained or increased;

c. Drawing and redrawing school attendance boundaries so that individual schools were required to enroll students in a racially segregative manner;

d. Establishing and reestablishing feeder patterns between elementary-junior, and junior-senior high schools in such a fashion that the junior high and senior high schools were purposefully made into racially segregated schools;

e. Establishing and reestablishing optional attendance zones so that individual student choices could and did, predictably, result in creating, maintaining or increasing racial segregation within the schools;

f. Locating and relocating bungalow or portable classrooms in such a manner that racial segregation was either created, maintained or increased within existing school facilities;

g. Renting or leasing private facilities for use as public school facilities in such a manner that racial segregation was created, maintained or increased within other public school facilities, with the full knowledge of the defendants;

h. Manipulation school facilities so that some were deliberately overcrowded while others were underutilized, all for the purpose of creating, maintaining or increasing racial segregation within the public schools;

i. Employing buses and other transportation equipment in such a manner as to transport students to schools in a manner which created, maintained or increased recial segregation;

j. Closing schools and reassigning students therefrom in a manner which either created, maintained or increased racial segregation within other schools;

k. Hiring teachers and other certificated or noncertificated employees in a manner which was racially discriminatory;

l. Hiring or promoting administrators in such a manner as was racially discriminatory;

m. Assigning administrators, teachers and other staff in a racially segregative manner;

n. Allocating financial, material and human resources in a manner which was racially discriminatory and which deprived plaintiffs of equal educational opportunities;

o. Utilizing testing procedures and instruments in a manner which was racially discriminatory and racially segregative;

p. Establishing transfer procedures for students, teachers and other staff in a manner which was racially segregative;

q. Ignoring repeated and continuing recommendations or objections from citizens about predictably segregative or discriminatory policies and procedures of the school district;

r. Establishing and carrying out student disciplinary policies and procedures which were racially discriminatory;

s. Applying for, obtaining and using state and federal financial resources in a manner which violated state and/or federal laws and regulations in that racially discriminatory and/or segregative policies and procedures were supported with such public funds; and

t. Establishing and operating a program of tracking within the school buildings and classrooms which has had the effect, if not intent, or separating students on the basis of race.

C. Local Defendants: Post-1970 Actions and Policies

40. From May 2, 1970 and continuing into the present, LAUSD was under a standing injunction from the State Courts of California to refrain from actions, policies, practices, customs, or usages which would create or maintain or extend racial segregation in its elementary schools. Notwithstanding the permanent injunction which both required specific levels of desegregation of the elementary schools and enjoined further acts of racial segregation as to students, facilities, faculties, and staffs, the

local defendants adopted policies and pursued practices which were racially discriminatory and segregative, including:

a. Closing schools and reassigning therefrom students in a predictably segregative manner;

b. Hiring and assigning faculty in a racially discriminatory and segregative manner;

c. Hiring and reassigning and terminating administrators in a racially segregative and discriminatory manner;

d. Establishing and operating a student transfer programs, including the Permits With Transportation Program, in a manner which has created racial segregation where it was not known to exist, and has increased racial segregation above the levels which were known to exist, all with the purpose or known effect of violating the state court injunction and orders;

e. Developing and attempting to execute a program of illegal tracking and ability grouping with the predictable resegregation which accompanies such practices;

f. Developing programs for using buses and other transportation equipment to effect racially segregated student assignments on a basis which disproportionally places the burden on minority students;

g. Hiring faculty administrators and other staff whose racially prejudicial attitudes toward black and other minority children impact the context within which the children are taught, with the result that the attitudes create a self-fulfilling prophecy of educational deprivation which has denied black and other minority children equal educational opportunity;

h. Establishment and operation of a system of district-wide magnet or alternative schools and/or programs which have served as vehicles to exclude black and other minorities and to provide white students with means by which they have been able to avoid attending schools with blacks and other minorities; and

i. Constructing schools in locations which these defendants knew or planned would create, maintain or increase racial segregation at times when other less segregative alternatives were available which would have been equally sound educationally.

D. The State Defendants

41. Notwithstanding that the California Constitution and decisions of state and federal courts have decreed public education to be a state function, the State Board of Education, State Superintendent of Public Instruction and the State Department of Education and Governor have defaulted in their legal responsibilities under the Constitution and laws of the United States and the State of California, in a manner which has violated the rights of the plaintiffs to equal protection of the laws under both federal and state provisions, including:

a. Approving the construction of schools in the LAUSD on sites and at times when the state defendants knew racial segregation would be the predictable and avoidable result;

b. Approving the construction of additions to existing public schools in the LAUSD when these defendants knew the result would be racially segregative;

c. Approving the use of rented, leased, bungalow or portable classrooms on locations these defendants

knew would create, maintain or increase racial segregation;

d. Permitting the establishment or reestablishment of school attendance boundaries, grade structures, and/or feeder patterns which these defendants knew would be racially segregative;

e. Approving or permitting the adoption of policies and implementaion of practices by the Los Angeles school officials with respect to hiring, assigning and promoting faculty, staff and administrators which the state defendants knew were racially discriminatory or racially segregative;

f. Approving or permitting the operation of student transfer programs, testing procedures and uses, and student disciplinary procedures which these state defendants knew were racially discriminatory or racially segregative;

g. Approving or permitting the local school officials to create optional attendance zones whose purpose or predictable and avoidable effect as to create, maintain or increase racial segregation;

h. Deliberately and wilfully disregarding requirements of state and federal laws and/or regulations which prohibited the operation of racially segregated schools by the Los Angeles school officials, with the result that these defendants joined the local school officials in a program of racial segregation in violation of applicable laws and provisions;

i. Approving or permitting the local school officials to use transportation equipment and programs to create, maintain or increase racial segregation in the public schools in violation of applicable federal and state laws and requirements;

j. Approving or permitting the local school officials in Los Angeles to seek, obtain and use state and federal funds in manners which the state defendants knew were violative of the rights of the plaintiffs and of the governing provisions of state and federal laws; and

k. Certifying as meeting minimum state standards various schools in the LAUSD which these state defendants knew were being operated in a racially segregative manner in violation of the rights of the plaintiffs and of applicable state and federal laws and provisions.

l. Failing to recommend legislation capable of effectively dismantling the dual school system of segregated schools existing in California and in Los Angeles, in particular.

m. Recommending budgets and programs for public education which were and are wholly inadequate to meet the minimal needs of dismantling the system of segregated schools in Los Angeles or of effectively eliminating the vestiges of past segregation.

V

ADDITIONAL CAUSES OF ACTION

42. The local and state defendants are now, and have been, aware of the historic racial segregation which has characterized the residential patterns in the Los Angeles neighborhoods. This residential segregation is found in both the public and private housing spheres.

43. The racial segregation in the private sphere is, in part, the result of governmental action dating back to the 1940's and 1950's, when the United States Government, through the Federal Housing Administration, required

private housing developers seeking federal financial assistance to guarantee that the resulting housing developments would contain "harmonious elements" within the tenant population. the interpretation given this language in the FHA manual was that diverse racial and/or ethnic groups would create disharmony which would be adverse to the government's financial investment, and that such disharmonious elements would prejudice the FHA against funding particular applications. The result of these federal government policies and their application was to create in communities across the country, including Los Angeles, homogeneous residential communities which exhibited specific racial segregation. These policies also resulted in a systematic discrimination by private developers and landlords who were federally funded against blacks and other minorities seeking to enter previously white residential areas.

44. Federal govermental racial policies have also impacted the Los Angeles neighborhoods and schools surrounding the military installations.

45. The local and state school officials were explicitly aware of the racial compositions of the federal military establishment but still chose to build school facilities in these racially identifiable areas, and to draw attendance boundaries in such a manner as to guarantee that the resulting student enrollments would be virtually one race.

46. The Los Angeles City and Los Angeles County Housing Authorities, and each of them, under both state and federal laws and regulations, have the responsibility for constructing, acquiring, maintaining and operating low-cost housing subsidized with public funds for eligible families of low income. These public housing units, sometimes located within housing developments, sometimes scattered-site units, sometimes leased from private owners or landlords, have historically been run in such a

manner as to create, maintain and increase racial segregation.

47. The policies and practices of the public housing officials have been mirrored in those of the redevelopment authority officials, Both public agencies have pursued policies and practices which have compounded the problems of racial segregation within the city, and have worked closely with the school officials in a manner which has incorporated the results of the public actions in housing and redevelopment into the public schools. School officials, with full knowledge of the residential patterns created by the action of the housing and redevelopment officials, have persisted in locating classroom units in a manner which created or increased existing racial segregation. The racial segregation which has thus been increased by the joint efforts of the public officials facilitated the syndrome of practices which have led to massive deprivation of educational opportunities. Plaintiffs will demonstrate during the trial the frequency with which the public officials have been petitioned by the citizens to take action to reverse or eliminate the segregated and inferior schools, housing and neighborhood conditions imposed, all to no avail.

48. The Los Angeles and state school officials have each been aware of the racial segregation within the public housing developments, but have still chosen to site schools, draw attendance boundaries, establish feeder patterns and assign students so that this racial segregation of which they were aware was incorporated within the operation of the public schools of the Los Angles Unified School District. These defendants have had, and still have, the responsiblity to avoid building a public school system upon residential segregation where other equally sound educational alternatives were available.

SUMMARY

49. By reason of the foregoing, Plaintiffs and members of the class they represent have been denied equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, have been forced to attend public schools made segregated by the actions and policies of the defendants while these defendants have been recipients of federal and other public funds in violation of the 1964 Civil Rights Act and implementing statutes, have been forced to endure psychological and educational harm by these defendants while they were acting under color of state law, and have been forced to receive inferior and unequal educational opportunities.

50. Plaintiffs, by virtue of the compulsory education law of the State of California, are forced to attend the public schools of Los Angeles or incur various penalties, and/or cause their parents and next friends to incur penalties imposed by operation of state law, even though the schools Plaintiffs and their class must attend, are being operated and maintained in violation of the Constitution and laws of the United States and the State of California. The compulsory education laws as they are being applied to the Plaintiffs and their class are unconstitutional, as violative of the First, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

51. Plaintiffs are informed and believe that defendants have done and will continue to do other acts which have resulted and will continue to result in denying Plaintiffs and their class the rights guaranteed under the Constitution and laws of the United States and the State of California, unless this Court intervenes to protect the Plaintiffs and the Constitutions.

52. Plaintiffs have no adequate remedy at law.

WHEREFORE, the premised considered, the Plaintiffs request upon the filing of this complaint:

A. That this case be advanced on the docket of the Court and a speedy hearing be ordered thereon:

B. That upon a preliminary hearing of this case on motion for preliminary injunction this Court will enter a preliminary injunction or decree enjoining the defendants, their successors, agents and employees, from maintaining racially segregated, educationally and psychologically detrimental schools; from building additions thereto or new schools which will be segregated and educationally and psychologically detrimental; from dispensing educational goods and services on a racially discriminatory and segregative basis; from inflicting harm upon black and other minority pupils by arbitrarily and capriciously expelling and suspending them from school; or from arbitrarily and discriminatorily assigning plaintiffs to educationally inferior and/or segregated schools or classes based on illegal testing procedures, tracking or ability grouping; or from closing schools and reassigning students therefrom on a racially segregative basis; or from hiring, assigning, promoting or firing faculty or staff on a racially discriminatory basis; or from consolidating schools or programs in a racially segregative and/or discriminatory manner; or from transporting Plaintiffs and their class in a manner which will create, maintain or increase racial segregation within the public schools;

C. That this Court issue a Temporary Restraining Order and a Preliminary Injunction requiring the defendants to keep in place the desegregation plan previously ordered by the State Courts, until this case has been determined on its merits and other appropriate relief can be fashioned, and preventing

these defendants from rescinding the desegregation plans of those Courts, and reverting to the condition of massive segregation which characterized the public schools prior to 1980;

D. That this court issue a Temporary Restraining Order and Preliminary Injunction preventing the state defendants from reducing the amount of educational assistance funds provided the Los Angeles Unified School District below the level of the 1980-81 school year, notwithstanding the passage of "Proposition 13", "Proposition 1", and/or other statutes, until this case has been decided on its merits or agreements reached by the parties;

E. That this Court grant the Plaintiffs a Declaratory Judgment determining that the rights of the Plaintiffs to educationally equal and unsegregated schools, based upon the United States Constitution and implementing federal statutes, may not be abridged by the Constitution and implementing federal statutes, may not be abridged by the Constitution or laws of the State of California including laws enacted by means of popular vote such as Proposition 13 or Proposition 1;

F. That this Court issue a Temporary Restraining Order and Preliminary Injunction preventing the local defendants from reducing the quantity or quality of educational programs or services for reasons related to the passage of Propostion 13 or Proposition 1;

G. That this Court issue a permanent injunction, after appropriate hearing, providing the Plaintiffs with the fully desegregated schools they are entitled

to attend by the express guarantees of the Constitutions of the United States and the State of California, by requiring the local and state defendants to develop for this Court's review and orders plans capable of effecting said desegregation of the student assignments, facilities, programs, faculties and staff and administrators, goods and other services;

H. That this Court enter appropriate orders to effect the minimum level of educational quality which the Plaintiffs have been denied by the illegal policies and practices of the defendants, includings programs and resources capable of teaching the Plaintiffs and their class to read, think, express in written and oral forms basic and conversational ideas; including sensitivity and inservice training of teachers, administrators and other staff capable of eradicating prejudicial and discriminatory attitudes and actions toward the Plaintiffs and their class; and including the removal of cultural biases from testing instruments, procedures and assignments based upon them; and including career and vocational training capable of preparing Plaintiffs and their class for realistic and productive lives as citizens, workers and parents;

I. That the Plaintiffs be allowed their costs and attorney fees and expenses incurred in order to vindicate these constitutional rights, and;

J. That the Court grant such other relief as, upon the record, may then appear to be proper and equitable in the premises.

DATED: August 5, 1981

THOMAS I. ATKINS
TERESA DEMCHAK
MARGRETT FORD
JOSEPH H. DUFF
NORMAN CHACHKIN
PETER GRAHAM COHN
NATHANIEL S. COLLEY
EVA JEFFERSON PATERSON
WILLIAM ROBINSON
WILLIAM TAYLOR

By_____
JOSEPH H. DUFF
Attorneys For Plaintiffs

PROOF OF SERVICE

I, Joseph H. Duff, certify and declare that I am a citizen of the United States, over the age of 18 years, and I am a member of the Bar of the United States District Court, Central District of California, and not a party to the above-entitled cause. On August 6, 1981, I served a true copy of FIRST AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS by personally delivering it to the persons indicated below in the manner as provided in FRCivP 5(b)

Executed on August 6, 1981 at Los Angeles, California.

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APPENDIX I

Proposition I amended Art. 1, § 7(a) of the California Constitution which now provides, in relevant part:

> (a) A person may not be deprived of life, liberty, or property, without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligation or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this Subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any other public entity, board or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.
>
> Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by an interested person, be modified to conform to the

provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

APPENDIX J

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 3
HON. PAUL EGLY, JUDGE

No. C 822 854

MARY ELLEN CRAWFORD, ETC., ET AL.,
PETITIONERS,
VS.
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
RESPONDENTS.

REPORTERS' DAILY TRANSCRIPT

Wednesday, January 9, 1980

Volume 43

Pages 6,385 thru 6,475, Incl.

Appearances: (See Volumes 1 and 2)

HERBERT R. CANNON, CSR #1923
and
NANCY L. HARRIS, CSR #644
Official Reporters

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RESPONDENTS' WITNESSES:

DIRECT CROSS REDIRECT RECROSS VOIR DIRE

KIMBROUGH, Theopolis D.

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(Resumed)
By Miss McKinsey: 6,449

LOS ANGELES, CALIFORNIA;
WEDNESDAY, JANUARY 9, 1980; 10:05 A.M.

THE COURT: All right, Miss McKinsey.

MISS McKINSEY: Can I say a few things off the record?

I want to protest the time slots I keep getting. First, I get afternoons on Friday and then I get the day when nobody is here.

THE COURT: You are the most spectacular of all counsel.

MISS McKINSEY: Maybe I should be more flamboyant.

THEOPOLIS D. KIMBROUGH,
the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

CROSS-EXAMINATION (Resumed)

BY MISS McKINSEY:

Q Mr. Kimbrough, let's start with the Hoover, Magnolia, Union transfer.

Can you tell me from which school to which school students are going to be transferred under the proposed plan?

A Let's see. I believe that — is this on?

THE COURT: Mr. Bailiff, I don't think the microphones are working.

THE WITNESS: I believe that Union is slated to go to Mountain View.

And Hoover is slated to go to Plainview.

THE COURT: Is there a significance between the high and the low there?

MISS McKINSEY: Yes; in a district that has frost and hail, we have got Mountain View and Plainview.

Q And Magnolia?

A Magnolia originally was going to go to Plainview. But after reconsideration, the other two were Sunland and Apperson that were going to be used in combination in order to provide enough classroom space.

Q Were the students from Hoover —

A Originally Hoover was going to go to Apperson and Sunland Elementary School.

But since Magnolia dropped out, they are now going to go to Plainview.

Q How did Magnolia drop out?

A It was almost an arbitrary decision that since we didn't have enough money, it was an evaluation as to which one of the schools would be more critically affected.

And it was thought that Magnolia probably could handle the overcrowding better than the other two.

Q Now, how much money was it expected to cost for the three schools for one semester?

A They average about $101,000 apiece.

And the two schools, I think, came in somewhere around $182,000.

So I would have to add maybe $90,000 to that if all three were being done. So you come up to $270,000, somewhere around that neighborhood.

Q And there are in the reserves how much?

A There is $283,000 the last time I looked at it.

That is after they took out the Belmont component.

Q And that was $100,000 for the Belmont component?

A $141,000

Q Are the reserves separated into different categories, or is that all one fund?

A There are a couple of reserves. In fact, there are many reserves. But the reserves — for instance, the building fund reserve is specifically and by law reserved for that purpose.

Q I am talking about the $281,000.

A That is the only reserve that is available to the district for general funds. It is the general fund reserve. That is it.

Q Now, the $182,000 for two schools or the $273,000 for three schools, how would that be spent?

A Basically for transportation, minor costs for moving the books and the supplies over to the other school, some additional aides to ride the buses with the children. But basically, that is what the cost is that is involved.

Q So the $182,000 for the two schools is for approximately 600 students?

A Somewhere around there, approximately, yes.

Q So that is about $300 per student for each class for one semester?

A If you divided it out, that seems to be right for one semester.

Q Is there some reason that the transportation costs on a yearly basis is less than the $1,000 that you have testified as an average cost for transporting students?

A I think Mr. Barney probably could answer it more precisely.

But the larger the number of buses and vehicles that you have, depending upon the routes of the buses that are already going in that direction, the maximum use of those buses, there are a lot of things that are involved.

There may be a bus going right past this school that is only being used half capacity. So it all depends upon a lot of things.

But those are the things that Mr. Barney submitted to my office to be used for this particular purpose.

Q So is it your understanding that these students will be transported as a congregation in a set of buses, or that they will be fit into some pre-existing schedule?

A I did not have the background as to what configuration would be used.

All I asked for was the transportation costs to do this for a given period of time. And that was the calculation that was supplied.

Q Mr. Barney did not explain to you why the cost was $400 a student less than what you estimated as an average cost?

A No. I didn't ask for it. I had no reason to ask for it.

Q Are there going to be separate administrations for the students from these schools? I guess it will just be Union and Hoover.

A What we have in those kinds of configurations, generally, you have a head teacher, but the principal of the school site is always the person in charge at that site regardless of who is on that campus.

There will be a head teacher that will coordinate activities of those students while they are there.

In some cases we have even assigned an assistant principal, depending upon what was involved.

Q Now, are the students that are transported from Hoover and Union going to attend classes with the students who are already at the sites?

THE COURT: Did you say attend classes?

MISS McKINSEY: Yes.

THE WITNESS: Be integrated into the classes that are there? Is that what you are —

Q BY MISS McKINSEY: Attend classes with the students who are there.

A Yes. They'll be in classes with the students.

If you are talking about if they are going to be mixed in the classrooms that are there, is that what you are asking?

Q Well, I didn't want to limit it to whether they were going to be integrated into the classrooms that were

already there or whether the classrooms were going to be changed.

A If they are at the school, Miss McKinsey, sure, they are going to be attending the school together.

Q Are they going to be attending the same classes?

THE COURT: We have used the phrase "school within a school" to indicate the partial integration or perhaps no integration even though they share the same facilities.

I am interested in determining whether or not this is going to be treated as a school within a school or whether or not the provisions for teaching and instruction and the other things that are presently in place will be used for these students.

THE WITNESS: Okay. It is my understanding that they are going to try to keep the whole class that currently is at Hoover, if you take that as an example, and move it to a classroom that is available at the receiving school. And that may be a 3rd grade class, a 3rd grade room vacant next to a 3rd grade class. But they are trying to keep the teachers and the pupils together to minimize the confusion of getting accustomed to a new teacher, traveling, and all kinds of things.

So the matter of a sense of still being together is a model that we have adopted.

Q BY MISS McKINSEY: So would it be accurate to say —

THE WITNESS: Perhaps you can help me, Mr. Peterson.

What is the non-resident enrollment? That is, what is the present enrollment including PWT?

MISS McKINSEY: I am getting to that.

Q Would it be accurate to say, Mr. Kimbrough, that the students are not going to comingle with the students that are at the receiving schools?

A No, that would not be accurate.

Q Are you aware that the area 5 superintendent has told the public that the students are not going to comingle?

A I don't know how you can control the comingling, particularly at playgrounds, lunch times and assemblies. I don't know how you prevent that.

I know that the self-contained classroom which is the model that is used in most elementary schools precludes you from mixing the children who are already in a program at this time unless you want to reorganize the school and do that kind of a mix.

Q So you are not planning to reorganize the school so that the students will be attending classes together?

A I have to define when you say "together," we are not — the current plan is not to take all of the 3rd graders that are at Mountain View and all of the 3rd graders that will be in-coming and take them and reassign all of them on some kind of a racial mix, ability level, anything like that and mix them up and give them new teachers.

That is not the model.

The model is to keep the students with the teachers that they currently have; move the classes there and cause as little impact on the educational program as possible for the initial stages.

Now, obviously, when it comes to next year if this model is still in force, then that would call for a different kind of organization; that the faculty members that would

be there would take all of the children and they would be redistributed from the 2nd grades of both Hobart and the 2nd grade of Mountain View and would be assigned to teachers in that fashion.

But the initial stage is not one that reorganizes the students and the teachers.

Q You testified on direct that the students who will be transported from Hoover and Union and at that time Magnolia would be transported to an integrated setting.

Do you consider this description that you have given us of what is going to happen to those students a description of an integrated setting?

A No. I said it was going to a currently integrated school is what my testimony was.

Q You used the words "integrated setting."

A Well, a currently integrated school is an integrated setting.

Q So that is your interpretation of an integrated setting, where there is a school such that if you added the numbers together, you would still have a currently integrated school regardless of whether the students are actually attending integrated classrooms?

A I think counsel is trying to read into my comments something that is not —

Q I am only trying to determine what you meant by integrated setting.

MR. PETERSON: I object to counsel interrupting the witness, Your Honor.

THE COURT: Finish your question.

And you may ask the question or move that it be stricken.

Q BY MISS McKINSEY: Did you mean, then, by the use of the words "integrated setting," that if one added up the numbers of the students at the school and compared them, that is, the white students compared to the number of minority students, that that would reach one's definition of an integrated school regardless of the fact that the students are not actually attending classes that are integrated?

A Obviously, you can isolate people within a school which removes them from any kind of experience that you wish to isolate them from.

When I look at an integrated setting, an integrated setting to me is one where students come in contact with other students from various socioeconomic, racial-ethnic nationalities during the course of their educational day.

Q Now, the students from Hoover and Union will be about 300 3rd graders from each school; is that right?

A Approximately.

Q What will be the racial and ethnic classification that you would expect of those 300 students?

A I would say they largely will be Hispanic students, as much as 90 percent of them.

Q And if you refer to exhibit 11-I that is in evidence —

Your Honor, could the witness be furnished exhibit 11-I?

THE COURT: If you will, Mr. Clerk, 11-I.

Q BY MISS McKINSEY: Now, if you would, turn to the page for Mountain View and the page for Plainview and verify for me that Mountain View — just how many other white students there are in the 3rd grade and how

many minority students there are in the 3rd grade at Mountain View.

A Mountain View 3rd grade, there are 46 students.

Q How many of those are white?

A There is 65 percent white which is 30, represents 30.

There is a combined minority of 16 for 34.8 percent.

Q Is that adding up the minority students from the —

A I am just looking at the list.

Q — from the on-site residents column?

A Yes, the 46. That is right. If you break the 46 down, you get a 30 and 16.

Q Is that from the last three columns?

A That is correct.

Q So you have 30 other white students and 16 minority students already in the 3rd grade at Mountain View?

A That's right.

Q And after the approximately 300 minority students from Union are added on, you have 30 other white students and 316 combined minority students; is that correct?

A That is correct.

Q Now, if these students were attending classes in the same classrooms, even if the classes were reorganized as you have testified earlier they are not going to be, would you consider that an integrated setting?

A The racial and ethnic — obviously, by the definition that we function under, it is not. It is not between the 40 and 60 percent.

I repeat that my understanding of integration is integrating white children with combined minority children on a 50-50 or 40-60 range.

Q And this is approximately —

A This is about 10 to 1, a little better than 10 to 1.

Q 10 to 1 with the excess being minority students?

A Minority, right.

Q Now, let's look at the figures for Hoover.

A That is only comparing 3rd graders to 3rd graders.

Q Yes.

A Okay.

Q Is it your understanding that the 3rd grade will be combined with other grades in some fashion?

THE COURT: Let's explore that for a minute.

There will be no other transfer of any other grade in Mountain View?

THE WITNESS: That is correct.

THE COURT: So if these statistics were looked at at the school what would you find statistically?

THE WITNESS: You would have about a 10 to 1 ratio.

THE COURT: Not in the grade?

THE WITNESS: In the entire school.

That number of children—I would have to look at the whole school—would probably make that—

Q BY MISS McKINSEY: On the second column on the bottom you have the figures for the entire school.

Do you see the 332 total, 240 other white, 92 combined minority?

A You see, it is going to—you have got a 17 and a 92 percent combined minority. When you look at the—the combined minority is 82 percent. And you have a 17.4 percent on the white children.

Q Using absolute figures, you see on the second column from the right-hand side the total number of other white students at that school is 240 and the total number of minority students at that school now is 92.

MR. PETERSON: Your Honor, I think—

THE WITNESS: I was looking at the wrong school.

I am sorry.

MR. PETERSON: Your Honor, Mountain View is a pair, cluster school. It is paired with Bushnell.

MISS McKINSEY: I object to Mr. Peterson interrupting my cross-examination to give facts to the court that constitute testimony.

MR. PETERSON: Your Honor, the reason I brought it up—

MISS McKINSEY: Your Honor, it doesn't matter to me why Mr. Peterson brought it up.

THE COURT: Let him finish.

MISS McKINSEY: Your Honor, when he interrupts my cross-examination to argue the case, why should I let him finish?

THE COURT: Because I am going to ask you to let him finish the same way you are asking him to let you finish.

MISS McKINSEY: We are not in equal positions here.

I am doing cross-examination, and he is trying to testify.

THE COURT: I asked a question which, obviously, is wrong.

We are going to get some totals and the answer which I am going to get will have no meaning without taking into account there was a pair and cluster with Mountain View.

MISS McKINSEY: Could I finish my cross-examination of the witness before Mr. Peterson interrupts? That will come out of my questions to the witness.

THE COURT: Are you asking Mr. Peterson to withhold his objections until you have finished?

MISS McKINSEY: He is interrupting to tell you the facts about Mountain View. That is testifying.

It has happened repeatedly. And it is very unfair to the people who are trying to conduct an examination.

THE COURT: I'll take a recess, and ask you both to come into chambers.

(Recess.)

(A conference was held in chambers with the court, Miss McKinsey, and Mr. Peterson, not reported.)

(The following proceedings were held in open court:)

Q BY MISS McKINSEY: Now, Mr. Kimbrough, we were looking at exhibit 11-I for the purpose of determining what the composition of the 3rd grade would be if the students were transferred. And after that, we were attempting to determine in response to a question from the court what the population of the entire school would be according to a racial and ethnic breakdown after the students were transferred, if they were transferred.

And is it true that both of these schools, Mountain View and Plainview, are involved in the district's desegregation plan so that they appeared with other schools other than Hoover and Union?

A I believe so.

Q So, the figures that we have in exhibit 11-I, coming as they purport to do from the racial and ethnic survey that was taken for the period ending 10-12-79, show what—they show the students that are there at the school on that day, or what do they show?

A Yes, as of that period ending that day.

Q So, in late January or early February, 1980, when the students are transferred from Union and Hoover to these two schools, what—other than absentees or some changes in the school since October, what will be the composition of the school on the day the students arrive from Union and Hoover?

MR. BARTMAN: Objection, Your Honor.

It is a vagueness objection caused by the fact that Miss McKinsey—if she is referring to using 11-I to derive those figures, it assumes facts not in evidence because our prior evidence is that 11-I is the resident enrollment after returning mandatorily bused and permit students to their home schools.

She would have to work off the photographic exhibit if she was going to ask that question. That is why it is a vague question.

MR. PETERSON: The exhibit would be 11-C.

THE COURT: The objection is sustained.

Q BY MISS McKINSEY: Let's go to 11-C, Mr. Kimbrough.

And this exhibit, does it not, shows the actual composition of the school on the day the racial and ethnic survey was taken?

A I don't have 11-C.

THE COURT: I'll take your 11-I back. I'll give you 11-C.

Q BY MISS McKINSEY: Now, If this is a photograph of the students that were at school in October of '79, is it your understanding that the composition of the school in late January or early February of 1980 will be approximately this, or is Mountain View in a pairing and clustering in such a fashion that the population of the school will be different in January or February of 1980 from what it was in October of 1979?

A Miss McKinsey, the mechanics and the details of the pairs and clusters is not something that I work with on a daily basis. So I don't have recall on who they appeared with.

MISS McKINSEY: Your Honor, could the witness be given a copy of exhibit 47, the pairing and clustering chart?

I am sorry.

It is 47—47 may do it, but 44 may be necessary, also.

THE COURT: Here is 47, and here is 44.

THE WITNESS: I see Laredo and Plainview are together.

Q BY MISS McKINSEY: Is that in exhibit 47 or 44?

A This is in 47.

Q And that is on which page?

A It is on the second page of 47, the third from the bottom.

Q And it says that grades 4 and 6 are at Laredo and grade 5 is at Plainview?

A That's right.

That is what it says.

Q Do you know what that means?

A It means that they change groups. When you say—what do you mean, do I know what it means?

Q Do you know that it means that all of the 4th grade—

A It means that the 4th graders—I would interpret this to mean that the 4th grade for that school is at Laredo.

The 6th grade is in some configuration where they are exchanging.

The 5th grade is at Plainview for both schools.

Q We can't tell from that what happened to the 6th grade?

A I would think that there is an exchange at some semester break or some designated point where they switch back and forth.

Q But you don't know?

A I don't know.

Q And on the first page of exhibit 47 there is a classification for Mountain View and Bushnell Way?

That says one-half of 4, 5 and 6; do you see that?

A Yes.

Q Do you know what that means?

A I would take it that one of the grades, the number of children of each one of those grades switch back and forth.

Q Do you know if it means they are going to switch at the semester or they are going to switch next year?

A Logically, I would think they would switch at the semester but it may be they do it at the year, as well.

Q It may be true as far as you understand it that the composition of one of these schools last fall may be the appropriate composition to look at for the other school for the spring semester?

A I would think that that would be a reasonable assumption.

Q So, in order to estimate what the composition of the school is, either at Mountain View or Plainview, we have to do some guessing and some estimating of what students will actually be there when the students are transferred from Union and Hoover?

A I would think that basically any given time that the percentage will vary little on the students who are in attendance at Mountain View.

Now, regardless of where it is, basically the percentages are going to remain the same during that school year. They may vary slightly because of students coming in and out, but I think that is a fair assumption, and so to take that population and apply an influx of any minority students on a percentage basis, I think, would be a reasonable way of estimating what the racial and ethnic makeup will be.

Q All right.

We will go to exhibit 11-C and take both Mountain View and the school with which it is paired and look at the

3rd grade and then look at the total school and we will not know when we are finished which set of numbers will be correct, but we will see if they are comparable numbers.

Do you understand what I am trying to do?

A Taking the 3rd grade at Mountain View and you want the percentage?

Q No.

I want the absolute numbers of other white students.

A I see 30 and I see 17 combined minority.

Q And the 3rd grade at, is it Bushnell Way?

THE COURT: Excuse me.

But, the 3rd grade at Bushnell Way does not have anything to do with the pair-cluster.

MR. PETERSON: That's right, Your Honor.

THE WITNESS: That's true.

THE COURT: It is the 4th grade only; 4th, 5th and 6th. And so the 3rd at Bushnell would be away from Mountain View and not connected with Mountain View, and not affected by the transferring into Mountain view, I would assume.

THE WITNESS: That's correct.

MISS McKINSEY: That is true, and even if the students were being flip-flopped, they wouldn't be transferred.

THE COURT: They would not be transferred.

Q BY MISS McKINSEY: So, we will get away from that problem in just a little bit.

The 3rd grade at Mountain View as we did before —

The problem I am having is you asked a question about the total composition of the school and I cannot determine what it is going to be.

THE COURT: I understand that, and I cannot find that out.

Q BY MISS McKINSEY: Let's assume for the purposes of the next question that the population at Mountain View in the fall will be the same population in the spring.

If we add to that total population of the school the approximately 300 Hispanic 3rd graders who are coming from Union to Mountain View, we have already determined what the population would be in the 3rd grade.

What would the total population of that school be as a total number?

A Well, you'd end up with a school of approximately 360 students.

Q Is that because there are 240 other white students already there and 72 combined minority students there and 300 more combined minority students?

A The figure I am looking at here, the bottom line under Mountain View at this given date, 10-14, says that there were a total of 360 students in the school on that date, of which 200 of them were white students and 160 of them were combined minority.

Is that what you are —

Q I am sorry.

I mixed up the figures with Plainview. So, if there were 200 other white students and 160 combined minority students as of October and if the population stayed the same in that school and the 300 minority students being transferred from Union added to that, would we have a

total of 200 other white students and 460 combined minority students?

A That is about right.

Q Do you consider that an integrated setting?

A In the school?

Q Yes.

A Do I consider it an integrated setting?

I would consider it integrated. That is my personal opinion of being integrated.

Whether or not that fits within the definition for which I have to function is another story.

Q When you said earlier that these students were being transferred to an integrated setting, was that an expression of your personal opinion that if there are any students of any other ethnic group there that that is an integrated setting, or did you mean to refer to the district's definition of an integrated setting?

A Miss McKinsey, once again, when I referred to this particular school and said it was a currently integrated school, now you want to talk about something that I really don't recall. When you say an integrated setting, that may have been in the commentary and I 'd have to look at the transcript to see what context that was said in for me to go back and explain that to you.

But from my personal point of view, this would be integrated within the district standard. You are talking about 460 students to 200, and that kind of a comparison is obviously outside of the 50-50, 40-60 range. I think it is just outside of the 40-60 range.

Q And let's take the phrase you just used, that these students are being transferred to a currently integrated

school and therefore there is some conclusion we should come to from that fact; you meant to say that they were being transferred to a school that was currently integrated before they were transferred; is that what you meant?

A They haven't been transferred yet.

Transferred, the Board hasn't even acted on transferring them.

This school currently fits the definition of a currently integrated school.

Q So that is what you meant, that if you look at the school before the transfer —

A That's right.

Q — takes place, it is a currently integrated school. And you did not mean to say, apparently, that after the transfer takes place it is a currently integrated school; is that correct?

A I don't even recall saying that.

Q Just now in your testimony.

A I said that it would be a currently integrated school?

Q When you referred to a currently integrated school, you were referring to the fact that it was currently integrated before the transfer takes place?

A Before the transfer takes place, the current status of Mountain View is that it is an integrated school.

Q So you did not mean to say that it fits the district's definition of a currently integrated school after the transfer takes place?

A That is correct.

Just for the record, when you say I did not mean to say that, that puts into an assumption that I did say that. And I did not say that.

Q Were you speaking of Plainview as a currently integrated school also?

A I think my testimony will show that I said that it is currently integrated.

Q And in making that statement about Plainview is it correct to say that you were referring to Plainview before the transfer takes place?

A That is correct.

Q So is it in your understanding correct to say that the composition of Plainview, after the transfers took place, if they did take place, would be approximately 276 other white students and 526 combined minority students?

A That is correct.

Q Does that fit your definition of an integrated setting?

A My personal definition?

Q Yes.

A I would say that is an integrated setting.

Q And your understanding of the district's definition of a currently integrated school?

A It would be outside of that.

Q Now, with respect to the 3rd grade at Plainview,if the transfers took place, is it correct to say that the composition of the 3rd grade, if it stayed the same as it was in October, would be 58 other white students and 319 combined minority students?

A That is correct.

B And is that an integrated setting?

A That is an integrated setting by the district's definition.

Q Under the district's definition that is an integrated setting?

A Yes. Integrating minorities with whites is the district's definition, the court's definition as well, as I understand it.

THE COURT: Let's see if we can get the percentages right.

11-C indicates 3rd grade percentage to be 75.24?

THE WITNESS: Yes.

THE COURT: The 3rd grade —

THE WITNESS: Under the district's policy, that is integrating black students with white students.

I know it doesn't come within the 40-60.

THE COURT: How about the 70-30?

THE WITNESS: The 70-30, it is outside of the 70-30 as well.

Q BY MISS MCKINSEY: But if those students from the overcrowded schools are added, if you want to figure out percentages and since the court seems to be interested in that, if there are 58 other white students and 319 combined minority students, what is the percentage of other white students and the percentage of combined minority?

A You come up to — 535 total minority —

Q The way I figured the percentage white students is to divide 58 by 357; is that correct?

A Did you do that already?

Q I am doing that now. It appears to be 16.2 percent.

A Did you get 18 percent?

Q This is embarrassing. I didn't even attend a RIM school.

MR. BARTMAN: Am I permitted to interrupt to tell you what it is?

MISS McKINSEY: Yes.

Q 58 other white students is the correct figure. The correct figure is the total of 377; is that right?

So 58 divided by 377 is what percentage?

A See, I did it with 319 instead of with 377, but we can do that.

Q 58.4 percent?

A Okay.

Q Is that 58.4 percent?

A Okay.

Q And then to get the percentages of minority students, it is 319 divided by 377; is that correct, and that appears to be 84.6 percent.

Does that agree with your figure?

A Yes.

THE COURT: Again, is it not true that Plainview is paired with Laredo in the 4th to 6th grade?

THE WITNESS: That's right.

Q BY MISS McKINSEY: So with the assumption that we made earlier that the composition of the school

may change and that we cannot tell from exhibit 47 whether it will —

A If you add the 300, it will change.

Q Yes. But the original figure we are starting with may not be the correct figures for the composition of the school as of the spring semester.

We determined that earlier, but if it is the same as it was in the fall —

A Yes.

Q And we have now determined what the total composition of the school will be after the transfers take place, if they take place.

A Fine.

Q And the teachers who are transferred with the students are going to be integrated into the faculty at the receiving school; that is, Plainview and Mountain View?

MR. BARTMAN: Objection, Your Honor.

Vagueness.

Does Miss McKinsey mean will they teach classes at which there will only be children —

THE COURT: Sustained.

Q BY MISS McKINSEY: Are the teachers who move with the students from Hoover and Sunland going to use the same faculty rooms, the same Xerox machines, the same —

A Rest rooms, cafeterias, playgrounds, parking lots.

Q Playgrounds, parking lots?

A The bus, if they use it.

Q The teachers who are already there?

A I don't know how you could prevent it.

Q Are you aware that the teachers who are assigned to teach students from Hobart at Wilshire Crest do not use the same facilities as the other teachers in the school?

A No, I am not aware of that.

Miss McKinsey, may I submit in evidence that I am a Director of School Building Planning and not the principal of Hobart and not the principal of Plainview or of Mountain View, and there is a difference in the functions as described in state law.

Q You don't have to answer to me, Mr. Kimbrough.

A I just think the record ought to be clear.

Q Have you been to Hoover Street School lately?

A Hoover?

Q Yes.

A Oh, about two weeks ago, I imagine. About 7 o'clock in the morning.

Q So you didn't see the students attend classes in the bathrooms?

A In the bathrooms?

Oh, I have been to Hoover many times and I have seen them in classes. I have seen them at fire drills. I have seen them in the bathrooms. I have seen everything you need to see at Hoover.

Q Did you see students attending classes in the bathrooms at Hoover?

A No, I didn't go in the girls' rest room. I went in the boys' rest room.

Q You didn't see a class there?

A No, I didn't see one in the boys' bathroom.

Q How much is the cost of closing Glenwood?

A I don't know.

Q Is that cost, whatever it is, going to be included in the funds that are taken from the general reserves?

A I don't know.

Q That we testified earlier now about $283,000?

A I don't know where they are going to get the money from.

Q Is the proposal that is going to be made to the Board next Monday regarding Hoover, Union, and Glenwood as a package, or is it going to be three separate proposals, or how is it going to be proposed?

A I don't know.

But, I could give you an estimate of what I think is probably going to happen.

Q Are you responsible for presenting this proposal?

A No, I am not.

Q Who is?

A The Superintendent.

Q That is, the superintendent of Area 5, Mr. Cooper?

A No, no.

The Superintendent.

Q The Superintendent of Schools?

A That's right.

Q Have you advised him how to present this proposal in any fashion?

A The Superintendent has asked me to write up a proposal for Hoover and one for Union for presentation.

I have not been asked to write up one for Glenwood.

Q Have you written those proposals for Hoover and Union?

A That's right.

Q You have already done that?

A That's right.

Last week.

Q And at the time, did you include Magnolia?

A No.

Q So you already knew last week that Magnolia was not going to be included?

A I knew that I did not prepare a report for Magnolia. But, as you well know, anything can happen at the Board table through the amendment process and four votes will do anything except make a budget transfer from undistributed reserves. That takes five; and a resolution itself probably takes five.

Q So who instructed you to make a proposal for Hoover and Union and not for Magnolia last week?

Q That came through the Deputy Superintendent.

Q Who is that?

A Dr. Harry Handler.

Q And is it your understanding that a decision will be made to drop Magnolia because of the awareness that there was not enough money to do all three schools?

A I think that is a fair assumption.

Q Are any of these funds for the transfer of students from Hoover and Union going to come from the desegregation fund?

A That is not my understanding.

Q Are you aware that Mr. Halverson told the court that the funds for this transfer would come from the desegregation fund?

A I am not aware of that.

Q Are you aware of any proposal in the past to take the funds from the desegregation fund?

A I am not aware of that.

The budgetary section was included in my reports that were submitted to the Superintendent did not do that.

The transfer did not come from integration funds.

Now, whether this is presented to the Board, I don't know, because the Superintendent can change any report that I make.

Q Yes.

But at nò time did you make a proposal that contemplated taking any of the funds from the desegregation fund; is that correct?

A I have not written a Board proposal to do so.

Q Did you ever do a proposal for any person in the district contemplating that any of the funds for the moving of students from Union and Hoover and at the time Magnolia would come from the desegregation fund?

MR. BARTMAN: Objection, Your Honor.

Vagueness, and assumes facts not in evidence.

There is no evidence that there is an integration fund, as opposed to SB-90 classifications for reimbursement.

THE COURT: There is, which was as a result of the order of whatever the date of that order is. I don't know whether it is—the origin obviously is SB-90, and obviously it is not a fund which is created. It is a reimbursable fund, but at least it is from Mr. Kimbrough's statement yesterday in which he indicated, perhaps my observation was correct, that there are two sources of funds. The one he works with is the budget.

The other one is an extraordinary type of thing which is an SB-90, but the purpose of signing that order, and I forget the date, was to set aside certain funds which would be expected under SB-90, and would be reimbursable under 90.

Now, that order has been signed about four or five months ago, and I assume that is what you are talking of.

MISS McKINSEY: Yes, Your Honor.

THE COURT: If you are talking to that sum, what was it 8, 9 million, or 10? I forget what it was.

MISS McKINSEY: I am referring to Mr. Halverson's statement to you that the $200,000 that remains in Mr. Jordan's office as funds was going to be used for this purpose.

THE COURT: I don't recall that.

MR. DUFF: Your Honor, there is testimony from Dr. Taylor and from the Superintendent in the original trial about the existence of a separate budget for integration purposes.

THE COURT: I recall that. I recall that.

But, I don't know of any in this pending year.

All I know is that I have signed an order which provided for $10 million for the reimbursement or for maintenance purposes.

There was a RIMS order that went along with it, and there was some money which was definitely set aside. My understanding it would be reimbursable under SB-90.

Those are the only sums I know of, but if that is what you are speaking of, I am going to overrule the objection.

If it isn't what you are speaking of, then I don't know what funds we are talking about because in this setting I haven't had any testimony on it.

MISS McKINSEY: Could I have a minute, Your Honor?

THE COURT: Surely.

THE COURT: Miss McKinsey, it would be helpful to me if it were to be developed as to who controls the expenditures of the funds for integration purposes and whether or not that is a separate line item.

And, thirdly, whether or not this gentleman has any access to those funds in any of the operations which he controls.

If I were to understand that, then I would know where to look for the expenditures and non-expenditures of funds for integration purposes.

But as I understand from yesterday's testimony — and this is my understanding. And if I am wrong on it, then we can develop it by further cross-examination, you or anyone else — it is my understanding that Mr. Kimbrough operates under a section of the budget which

comes from general revenues from Bail-out Funds. I suppose it is a general revenue now. And that he is limited under that, under normal operations. And he has not developed a technique yet of how to make his moves and charge it off to integration. Somebody, apparently, hasn't told him how or won't let him, one or the other.

But on the other hand, if he is limited to the funds which come from the revenue which is available to the district for ordinary purposes except for integration, then I understand this business when he says there isn't money. I understand that the Board hasn't appropriated the money or has only appropriated X amount of dollars.

On the other hand, if when he says there isn't any money, is he saying there is the possibility of using the reimbursable money, that is something else. I really — I hope I am going to find that out one of these days, how this occurs.

I am sure the Board will put it on.

But right now it is my understanding — and if I am wrong, you may explore it — Mr. Kimbrough has no access to any integration funds in his normal operation.

Q BY MISS McKINSEY: Is the statement the court just made a correct statement of your access to desegregation funds?

A That is correct with the exception of the capital funds that are within the budget that have been earmarked for integration that in essence has been placed under my control.

But those are capital funds that went through the budget that in essence were in my budget.

But operational integration kinds of expenditures, I have no control over those.

And the court's statement is correct.

Q Does the superintendent have discretion to allow you access to integration funds for the purpose of housing students or transporting them?

A The superintendent may instruct staff to propose to the Board a transfer of funds or he may instruct Mr. Jordan and Dr. Halverson to allow the expenditure within the defined budget if they are available.

So there are a couple of different kinds of accesses that the superintendent does have.

Q And some of that access is without Board action?

A If it has already been approved by the Board and there are funds within the line items necessary to complete a task, in essence, the Board has already approved it and it is up to the discretion of the superintendent to implement those line item budget items.

THE COURT: Let's take that one step further, if you don't mind.

Assuming at this point that the superintendent determines that the transfer from these two schools or from any of these schools would be in furtherance of integration, at that point that move could be funded outside of your reserve funds?

THE WITNESS: It could be funded outside of the reserve funds if you had the initial access to the funds to spend so that you could be reimbursed the next year.

THE COURT: That assumes that it is reimbursable and not initial funds?

THE WITNESS: That's right.

THE COURT: I understand.

Q BY MISS McKINSEY: But what kind of approval of the Board would have had to have been necessary to make those funds accessible to the superintendent?

MR. BARTMAN: I am really confused as to which funds right now, Your Honor.

THE COURT: We are talking about funds over and above his reserves, Mr. Bartman.

MR. BARTMAN: Which funds?

It just leaves a meaningless ambiguous record.

THE COURT: I think we have been talking about funds that are outside the reserves which would be available for integration purposes.

You may answer.

THE WITNESS: May I have the question again, please?

THE COURT: If you would, Mr. Reporter.

(The question was read.)

THE WITNESS: As earlier stated, the funds coming from the general reserves take Board action.

The reserve fund itself is part of the budget and is put there for unforeseen expenditures that will have some way of addressing them throughout the school year.

When you have a budget of a billion, four hundred million dollars, you have to have some kind of reserves. So that takes a Board action, seeing that the only place that funds have been identified is in the reserve at this point.

Q BY MISS McKINSEY: Now, if there are funds set aside as reserves for integration, under whose control are those reserves?

A That would be under Dr. Jordan and with approval of the superintendent.

Q So is it correct to say that if Mr. Jordan and the superintendent determined in their discretion that an action is in furtherance of integration, that they have funds available to spend without Board action?

A That is presuming that the action had already been granted and delegated to them for a certain item. They have the discretion to carry out the Board's line item budget.

Q So how specific would the itemization be?

Would it be more specific than saying furtherance of integration?

A Okay. If we are speaking in terms of transportation, as an example, there may be three and a half — just say four million dollars in a line item for transportation for integration.

If the expenditures are projected and for some unforeseen reason it is only projected that we'll spend three and a half million dollars of the four million dollars and another integration project comes along that needs to have transportation, it is not necessary for the superintendent to go back and ask for authority to spend that additional half million dollars. He has already been authorized to do that with the adoption of the budget for that particular line item.

Q So any kind of transportation of students that the Superintendent determines is for the purpose of integration can be paid for with those funds without Board action; is that correct?

A If it does not exceed the amount of funds that are already there.

Q So is it correct to say that if the funds had been available for transporting students in a sufficient amount to transport the students from Union, Magnolia and Hoover to the schools in Sunland, Tujunga, and if the Superintendent has determined in his discretion that that was in furtherance of desegregation, that the funds could have been spent without Board action?

MR. BARTMAN: Objection, Your Honor.

There is an inference in that question that they would be reimbursable, and I believe that asks for a legal conclusion about whether such funds would be reimbursable.

There are some two segments in the question.

MISS McKINSEY: No, I am not asking that question.

THE COURT: No, no.

She didn't ask that. All she is asking is whether there was a line item that was appropriated by the Board for transportation, if there is any excess of funds for transportation whether the district or Superintendent can discretionarily allot those funds. Whether they are reimbursable or not, that is the Board's problem, but at least within the staff whether the Superintendent can.

If you would, sir.

THE WITNESS: Yes.

Q BY MISS McKINSEY: So the reason we have this proposal being made to the Board is that the funds were not sufficient to do this project; is that correct?

A Which project are you talking about?

Q The project of transferring the 3rd grade from Union, Magnolia and —

A That they are not sufficient?

Q That the funds available were not sufficient.

THE COURT: Which funds, Miss McKinsey?

Are we talking about the funds which are in the reserves, or are we talking about funds which may be available under SB-90?

MISS McKINSEY: I am trying to determine that, Your Honor.

THE COURT: I think he's indicated — perhaps I am confused, but I think he's indicated in past testimony that he is working off of reserve funds which is 280 or some $300,000.

But they made the determination that the three schools would run over the reserves, and therefore they went to two schools instead of Hoover, or not Hoover — Magnolia.

MISS McKINSEY: Left out Magnolia.

THE COURT: Left out Magnolia.

And the funds which he is using for that are reserve funds.

That, I think, has been determined.

MISS McKINSEY: Yes, and I understand that.

But, Your Honor, I am going back to the statement by Mr. Halverson in chambers that $200,000 that was in Mr. Jordan's budget was going to be spent for this project because the argument could be made that this was a desegregation program.

I recall the statement.

THE COURT: Frankly, I have forgotten that statement, if it was made. I am going to have to look at the transcript, if there was a transcript on it.

MISS McKINSEY: That is why I conferred with Mr. Duff earlier. I am not sure that was even on the record.

THE COURT: I don't recall that particular —

MISS McKINSEY: Because the subject of the conversation was the simulations by Hamilton-Rabinovitz and that was just brought up. It was not on the subject of the conversation.

THE COURT: I don't recall it.

But, go ahead.

Q BY MISS McKINSEY: Now, if it had cost $200,000 to transport the students from Union and the other schools to the Valley or to Sunland-Tujunga, and if the Superintendent had determined that such transfers were not in furtherance of desegregation, is it correct to say that that $200,000 could have been spent for that purpose without any Board action?

A No.

Q And why is that not correct?

A Because it takes a vote of the Board to spend money out of the reserves. The reserves takes Board action.

Q And your understanding of the $200,000, or whatever figure it is, that is in Mr. Jordan's budget set aside for desegregation purposes that are not specifically funded for that?

A I don't know anything about Mr. Jordan's budget.

Q All right.

Then we are to interpret your last answer as an aswer based on the general reserve practice?

A My answer is based on what I have been talking about, which is the general reserve of the district in which

I have drawn up Board reports against that Board reserves account.

What Mr. Jordan has, I don't know.

Q Thank you.

Now, before these students were transferred or the suggestion was made that they should be transferred from Union, Hoover and Magnolia, is it true that there were annexes established to each of those schools?

A Annexes?

There is an annex at Hoover.

Magnolia doesn't have an annex; not to my knowledge.

An Union, Union has—no, Union doesn't have an annex.

10th Street has an annex.

Q So, of the schools in the district, how many schools have what is called an annex?

A An annex.

Of the elementary schools in the district, I think Wilshire Crest is the one that houses the annex from Hobart.

Q So Hobart has an annex which is at Wilshire Crest.

Hoover has an annex—or does Hoover have more than one annex?

A Yes.

Hoover has—I guess you would call it the annex. It is an annex around the corner and down the hill, even though it is on the same block. So I guess you'd have to designate it as an annex.

Q And then there is another which is next door?

A No.

That is across the street. That is on district-owned property.

The one around the corner is on district-leased property. But that is part of the campus across the street, so it would not be an annex.

Q Does the principal at Hoover, to your knowledge, say that there are two annexes to Hoover already?

A I don't know what the principal says.

Q But there is at least one annex; is that correct?

A There is one annex.

Q And then there is an annex to 10th Street.

Where is that located?

A That is really not an annex because what we have done there is those students—yes, I guess you would call it an annex. Cienega and Vermont.

THE COURT: I wish somebody would tell me what an annex is.

MISS McKINSEY: I am hoping to get to that.

Q What would you define an annex as?

A An annex is where students from a school are moved to another location, along with their teachers, and in essence, even though they are on another campus, they still belong to the home school and reported as such.

THE COURT: It is not on the site. It is off site?

THE WITNESS: It is off site.

Q BY MISS McKINSEY: So if there were a separate administration, you would call it a different school but it

is the existence of the same administration that makes it an annex instead of a separate school; is that correct?

A The teachers, as an example, the teachers who are from 10th Street who are on the campus of Cienega, the program that those students have right now is the program that is of 10th Street.

All the reading materials, the math materials, all the articulation programs, are of the school of origin.

However, when those teachers go on the campus, they are subject to the rules and regulations and the administration of the school even though there may be a head teacher involved with the teachers from 10th Street.

So it is not a pure kind of administrative configuration that you are talking about.

Q But the annex at Hoover, is it because of its location that it is more closely related to the administration of Hoover Street School?

A That is all under one administration there at Hoover.

Q Yes.

A You mean, the one around the corner on the same block?

There are three bungalows around there and that is under Mr. Hauskey's administration.

That is not on another campus. It is on another piece of property that is leased, with district-owned bungalows on that piece of property.

Q Is that the same location where there is a church?

A No.

Q So the location where there is a church is the annex across the street?

A At Hoover Street — you mean, backing up to the apartment building there?

Q I am just trying to detemine how many —

A I don't know what church you are talking about. I really don't.

I know across the street where the Singer property used to be there is a gas station in back of that and apartment buildings on the west side of that, and to the front of it is the school itself.

The annex around the corner and down the street is on a corner and there is an apartment building on one side and I don't recall what is up on the other sie of it.

THE COURT: Why don't we just get a description of these schools? We are getting into things that may be of great significance, but I don't know what they are.

THE WITNESS: I don't know what they are.

THE COURT: Well, I will rule on that.

THE WITNESS: Okay.

Q BY MISS McKINSEY: Well, to your knowledge, were there what you call annexes established and attached to existing schools in some fashion before the 1970's?

A Before the 1970's — I don't know.

Q Were you in office when the annex was first established at Hoover?

THE COURT: May I save a lot of trouble.

If counsel wants to view on the matter, we can all take a view and look at all the schools that people want to look at and it would save a lot of testimony, and I have no objection to it even on a rainy day.

MR. PETERSON: Your Honor, we would be pleased to do that.

THE COURT: If counsel can get together on a list of schools they want me to take a look at, I will do it. Name the time and place and we will do it.

MR ROSENBAUM: Can we go by bus?

MISS McKINSEY: We insist that we go by bus.

MR. BARTMAN: Am I allowed to hitch-hike?

THE WITNESS: As long as I don't have to ride in the back of it.

Q BY MISS McKINSEY: Did anyone tell you that the district was under a prohibition of building separate schools in the area of Hoover Street School?

MR. BARTMAN: I object to the word "separate," Your Honor. It is vague. Just schools.

THE COURT: True, I don't know what you mean by "separate."

Q BY MISS McKINSEY: Why were the annexes established as annexes instead of as new schools?

A First of all, if you take —

You pick one.

Q Let's take Hoover. The population of Hoover as a total is now around 1,600; is that correct?

A 1,680, something like that. Maybe 18. I don't know.

Q When the population of Hoover exceeded what you testified was the maximum size that you would accept as the size of an elementary school, around a thousand, why wasn't a separate school built to take the excess students?

A A couple of things that precluded that.

Number one, the district had not passed the bond issue; had no access to funds. That is number one for openers.

Number two, it was obvious that the school would open as a racially segregated school. And the district doesn't have authority to open a school that is racially segregated.

Q Did anyone communicate to you a prohibition against adding classrooms at a racially segregated school?

A There is no prohibition.

Q Did anyone tell you that there was a prohibition against providing additional facilities for educating children at a racially segregated school?

A There is none.

Q In your opinion as the head of the housing division when you provided classrooms at Hoover to educate more students at that location, was the amount of segregation at the location affected at all?

A The percentage —

THE COURT: Just a minute.

May I have that question again, Mr. Reporter, please?

(The question was read.)

THE COURT: All right.

THE WITNESS: The amount of segregation percentagewise, it was not.

Q BY MISS McKINSEY: So 100 percent of the students were racially isolated before you added classrooms at Hoover and 100 percent of the students were racially

isolated after you added classrooms at Hoover; is that what you are saying?

A I don't know what the percentage is, but the percentage was not affected, whether it was 75 percent, 80 percent, whatever.

We simply provided classroom space for the children that were already living in that attendance area and attending that school.

Q And at the time there were a thousand students attending Hoover Street School in a racially segregated school and 100 more students moved into the area and you provided space at Hoover for the additional 100 students, is it correct to say that those 100 students represented an increase in segregated education going on at that location?

A First of all, I didn't do that. I wasn't in office when that happened.

Q Were you in office when the number went from 1,500 to 1,600?

A No.

Q When it went from 1,600 to 1,700?

A Probably.

Q 1,700 to 1,800?

A Probably.

Q And in any one of those increments is it correct to say that 100 more students were attending a segregated school after you provided the facilities than there were before?

A That is correct.

MR. BARTMAN: Objection.

I'd like to make a motion to strike for the purposes of interposing an objection.

THE COURT: What is the objection?

MR. BARTMAN: My objection is vagueness, and it is illustrated by the witness' answer.

Miss McKinsey asked whether an additional 100 students after the addition of facilities would be attending a segregated school.

THE COURT: I think you are right.

MR. BARTMAN: The problem is they were there before. They were just providing housing for them. That is unclear.

THE COURT: That is what he said. I don't know.

MR. BARTMAN: That is why the question is vague and unclear.

THE COURT: I am not going to strike it.

You may either explain it on your examination, or make that indication.

His answer prior to that was when you were down to 1,000 was it didn't add merely students. It merely added more space and therefore the racial composition wasn't changed.

Whether or not when it got up to 1,800 you added more students, I don't know.

Q BY MISS McKINSEY: Mr. Kimbrough, when the number of students attending Hoover was 1,600 and another 100 students could not be housed at Hoover in the existing facilities, what were the alternatives available to you in order to house an additional 100 students?

A I think in the document that was presented in evidence, I don't know which one it is now, we listed as

the — I think it is the November 16th document — I am sorry. It is not.

Q And so all the options that you testified earlier —

A All the options that I have testified to earlier were available but some of them would have required, because of the fiscal implications, would have required Board action, particularly as it relates to a time prior to the Board's action to establish enrollment ceilings.

We did not have that authority at that time to do so.

Q So when the number of students at Hoover was 1,600 and had gone to 1,600 from 1,500, what alternative did you take to house the additional 100 students?

A The alternatives that were — that I took, obviously the ones that were taken while I have been in office, and I will disregard the numbers because I think what you are getting at is what I have done since we have been there.

If you take Hoover Street School, we were using, for instance, the Singer building across the street from school. We were leasing that facility.

It became obvious after analyzing the number of students in the area and the facilities at the school that we were going to have to do several things, one of which was to acquire usage of additional land space because the site was very small and we were going to have to use a configuration using more air space for housing of classrooms and students, putting students in classrooms and more air space which met multi-story.

We looked at the Singer building, which I had our engineer staff to go out and look at it structurally and found that that building was not safe. It wasn't safe for occupancy of anybody because of its structure and its kind of construction where the roof was merely setting on top of unreinforced brick walls, and I said, "If we get

through the next two months, nobody is going back in that building."

So I proceeded to try to purchase the land, the building, which we were able to do. Tore the building down, blacktopped it. Put utilities in and have now placed an equal number of, I hope by today, equal number of bungalow classroom representation with an additional J building, which is a sanitary facility to help with the sanitary facilities at that time.

That is one of the pieces that has been done.

Obviously the other pieces deal with the construction of larger classroom facilities at that site. That will not augment — not offset the problem there as I have earlier testified. There is going to have to be a movement of students away from that school even after we complete the building program at that school because it will not house the 3,000, I think it is slated to be there, in 1984. I think that is what the projection is.

Q When you put —

A At Hoover, 2,968 students are slated to be in there in 1984.

Q When did you put the portable classrooms on the Singer site?

A Part of them were put on in September and this week the remaining buildings were supposed to be put on. I let a contract.

I do work, besides coming here, Your Honor. I really do.

I let a contract after the Board met on Monday night. The next morning we let a contract to move the other buildings in.

Q Did you consider the putting of portable classrooms on that site to be an addition to Hoover Street School?

A An addition?

No.

It is part of it, because it is district-owned property. It is part of that school.

Q Is it an expansion of the school?

A Expansion of the school?

Sure, but it is that school.

Q Is it a construction of an addition to existing schools?

A Is it a construction of an addition to an existing school?

Yes.

Q Did anyone tell you that you were prohibited from constructing additions to existing schools —

A I have not —

Q — that would perpetuate segregation at the school?

A I have not restricted adding classrooms to an existing school.

Q So is that one of the reasons that classrooms have in the past been added to the Hoover School instead of a new school being built?

A I would say that is a fair assumption.

Q You say that at least the addition of these portable classrooms to the Hoover Street site preserves the segregated nature of the school?

MR. BARTMAN: Objection, Your Honor.

"Segregated nature."

MISS McKINSEY: If it does not increase it?

MR. BARTMAN: Objection, Your Honor.

The figures speak for themselves. Characterization of it. She can ask him what it does to the racial and ethnic survey data.

THE COURT: I don't have the figures in front of me. I don't know whether additional students then enrolled that were not enrolled before or whether the difference between day one and day two, all you did was add additional space for the students that were in day one. I don't know.

MR. BARTMAN: That is the problem with the question.

MISS McKINSEY: The question is, was the segregation preserved, if not increased.

THE COURT: That, I don't know.

You may answer, if you can.

THE WITNESS: I really can't answer the question. All I know is that there were additional rooms that were built at that school.

Q BY MISS McKINSEY: Well, if I told you now that Judge Gitelson's order said you were not allowed to add — to do anything, including by way of specification, construction of additions to existing schools which will maintain or continue or preserve or tend to maintain or continue or preserve the minority segregation presently existing in its schools.

My question is: Does the provision of additional classrooms at least preserve the segregation at Hoover, in your viewpoint, of what really happened?

MR. PETERSON: Objection, Your Honor, on the grounds that Miss McKinsey is asking the witness for a legal conclusion and to interpret a legal order.

I think that is an inappropriate question put to a lay witness.

THE COURT: Well, in all cases of possible contempt, I have to warn the witness that he has a right not to answer the question on the grounds that he may tend to incriminate himself. He has the right to counsel. He has the right to consult with counsel.

THE WITNESS: I'd like to consult with counsel.

THE COURT: You may do so.

And this is exactly where we are leading. We are leading to a contempt proceeding, and this witness has placed himself in jeopardy by answering the question.

Be in recess —

MR. ROSENBAUM: May the record reflect the witness is now consulting with counsel.

THE COURT: I don't know whether he is, or not. I am taking a recess.

(Recess.)

THE COURT: Let's get counsel in.

THE BAILIFF: Your Honor, they are not in the conference room and they are not in the hallway.

THE COURT: The record will indicate it is 10 minutes to 12.

We'll be in recess until 1:30.

(At 11:50 a.m. a recess was taken until 1:30 p.m. of the same day.)

LOS ANGELES, CALIFORNIA;
WEDNESDAY, JANUARY 9, 1980; 1:35 P.M.

THE COURT: Do you have the last question, Mrs. Harris?

MRS. HARRIS: Yes, Your Honor.

(The following question was read by the reporter:)

"Q BY MISS McKINSEY: Well, if I told you now that Judge Gitelson's order said that you are not allowed to add, to do anything including by way of specifications, construction of additions to existing schools which will maintain or continue or preserve or tend to maintain or continue or preserve the minority segregation presently existing in its schools, my question is does the provision of additional classrooms, at least, preserve the segregation at Hoover in your viewpoint of what really happened?"

THE COURT: And the objection, please.

THE REPORTER: (Reading:)

"MR. PETERSON: Objection, Your Honor, on the ground that Miss McKinsey is asking the witness for a legal conclusion and to interpret a legal order. I think that is an inappropriate questi n to put to a lay witness."

THE COURT: Objection sustained.

THEOPOLIS D. KIMBROUGH,

the witness on the stand at the time of the recess, resumed the stand and testified further as follows:

CROSS-EXAMINATION (Resumed)

BY MISS McKINSEY:

Q Mr. Kimbrough, isn't it a fact that you yourself had questions as you began to consider alternatives to the housing of students at Hoover Street School and other schools that were becoming overcrowded, you yourself had questions about whether that was a legal thing to do, to provide additional classrooms?

THE COURT: Mr. Peterson, I assume you have discussed this matter with your office.

MR. PETERSON: Yes, Your Honor.

THE COURT: All right.

MISS McKINSEY: Your Honor, all counsel have stipulated that Mr. Kimbrough personally is —

Petitioners have not stipulated. Excuse me.

THE WITNESS: Did I have questions?

Q BY MISS McKINSEY: Yes.

A Yes.

Q Isn't it a fact that you consulted various people at the district to determine whether it was legal for you to continue to add classrooms at minority segregated schools?

A The question arose at the beginning of my tenure as to whether or not it was legal to build or to add on to campuses and I did ask that question.

Q Who did you ask?

A I asked that question of Dr. Halverson.

Q And what was his response?

A The response was that to build new schools was illegal at this time and would be in violation of court order. But, that the moving of bungalows from campus to campus and adding to existing sites for the express

purpose of housing the students that are already there did not violate any existing statutes or orders.

Q Did Mr. Halverson tell you that you must put enrollment ceilings on the school so that the number of students present at the school did not increase?

A No.

THE COURT: I am going to have to, at this point, find out your intentions, Mrs. McKinsey, in asking these questions because if your intention at this point is to establish a contempt, this will stop these proceedings at this point until contempt is established because I cannot allow the Board, without a notice, to proceed to answer any questions respecting their plan or proceed any further on the basis that any of the questions which they ask may either add to or detract from the contempt. And what it means in this effect is that we will have come to a screeching halt in examining the plan.

I am either going to decide on listening to a complaint on contempt or I am going to listen to the plan. It is going to be one or the other. It can't be both, and you are going to have to tell me at this point.

If you are going to proceed with the contempt, I am going to ask you to give notice and specifications of the contempt.

MISS McKINSEY: Your Honor, I never intended to ask this witness any questions that had to do with a contempt citation.

THE COURT: Well, this is exactly the questions that you are asking, Mrs. McKinsey.

You are asking as to whether or not this is in violation of an existing court order and they have only materiality insofar as it would require me to exercise

sanctions against those people who consciously, wilfully have disobeyed that order if such exists.

But in all fairness, notice should be given and specifications should be given, and I am not going to allow this proceeding as a discovery proceedings for the purpose of working up a contempt.

MISS McKINSEY: Your Honor, this whole matter has been discussed in detail at Mr. Kimbrough's deposition.

THE COURT: Well, it may have been, but I have a duty at this point to run these proceedings in a manner which will proceed with what I consider to be the issues in the case, and contempt has not been made a specific issue in this case at this time.

Furthermore, it is my considered opinion that if you are going to proceed with contempt, that the contemptees or the contemnors are entitled to notice and specification of the grounds in which that is done.

MISS McKINSEY: Yes, Your Honor.

And if we were attempting to establish contempt, we would certainly give that kind of notice.

The reason for asking questions about the annexes is that the Board has come to you and said the schools are overcrowded, and there is nothing that can be done except to build new schools.

THE COURT: I understand that.

But, why the reference back to Judge Gitelson's order if it is not for the purpose of establishing a foundation for contempt?

MISS McKINSEY: Because the course of conduct that the Board has engaged in has been to not do anything but to add to the existence of these schools as they sit.

THE COURT: I may come to that conclusion.

But the question is if it is in violation of Judge Gitelson's order, then it amounts to contempt if proper intent is shown and all I am saying is that the reference back to Judge Gitelson's order can't lead me to any other conclusion that that is where you are going.

If you aren't going there, then the questions which reference back to Judge Gitelson's order are immaterial.

MISS McKINSEY: Well, Your Honor, the other reason for asking the questions about what he was told, who communicated to him, what the meaning of the desegregation order was, and so forth, is to establish that the conduct that will be engaged in in the future by the Board of Education will be the same kind of conduct that was engaged in in the past and that is that —

THE COURT: And for what purpose?

MISS McKINSEY: For the purpose of saying that the remedy that the petitioners should get in this case is a remedy that will assure —

THE COURT: If you are trying to show the bad faith of the Board, that is one thing. But if you are trying to show that the Board is in contempt of Judge Gitelson's order, that is something else.

I'll ask you to declare clearly what direction you are going so that I can adequately rule upon the evidence and the objections made and so that I can adequately receive the evidence so I'll know in which direction you are going.

But I think I am going to insist upon — and I think it is only fair to me to insist upon knowing whether these questions go to bad faith or go to a willful disobedience of the existing order.

MISS McKINSEY: They go right now to the issue of what kind of remedy has to be ordered in this case; that is, how specific it has to be, what the purposes have to be stated to the Board, in what kind of language the language will have to be stated so that the Board will follow it. And also it has to do with the cause of the existence of the problem that the Board is asking you to solve.

And —

THE COURT: Then I would consider it to be immaterial.

MISS McKINSEY: On those narrow issues, I seek to ask the questions at this point.

If I requested the opportunity to prove a contempt by the Board of Education, then I would follow the proper procedure.

THE COURT: Well, the problem is this: The questions which he is answering then places him in peril.

And that is fine if counsel is aware of this and you have no objection to his answering this, Mr. Peterson, then I want to know this.

Miss McKinsey has made herself quite clear that she may intend to file contempt proceedings subsequent to this.

MISS McKINSEY: Your Honor, this witness is an agent of the Board of Education. He personally —

THE COURT: I don't know whether he is or not. I don't know whether he acted on his own or not.

You have asked him for his own opinion. You asked him whether he knew personally or felt personally whether or not he was violating an act; that it is a possible contempt. And that is where you placed the witness.

MISS McKINSEY: I understand, Your Honor. That is why I started this afternoon with the course of inquiry of with whom did he consult and who told him that what he was doing was an acceptable thing to do.

MR. DUFF: May I be heard briefly, Your Honor?

THE COURT: No. I am interested in the Board's position.

MR. PETERSON: Your Honor, given the explanation and the exchange between yourself and Miss McKinsey, I think until we do have some kind of formal notice precisely as to the charges, that I would request that Mr. Kimbrough not have to answer questions that could place him in jeopardy of contempt as long as that possibility seems to exist.

I have no objections to Miss McKinsey exploring in depth the problem of overcrowding, alternatives to it, and what ought to be a solution.

And I think from that information you can determine how best to frame whatever order may be appropriate.

But I am concerned about this question of contempt, particularly since it was not raised in any specific fashion in any of the pleadings.

THE COURT: I am inclined to agree with your position.

Mr. Duff?

MR. DUFF: Your Honor, in all candor with the court, we have been, from the beginning of these proceedings, alleging that the Board has continued its pattern of de jure segregation.

THE COURT: I have no problem with bad faith. I have indicated in the past that the question of bad faith can be tried right along with the question.

But I have never indicated that I am going to dispense with any formal notice of contempt. And I do not intend to.

This is a semi-criminal proceeding at that point. And it takes on a brand new different type of proceeding. And I don't intend to try this case without that particular issue being handled in the proper manner.

MR. DUFF: I am not the questioner; so I don't know what Miss McKinsey's intent is as to contempt.

But we have been, from the beginning, stating objections to the plan with respect to the continuing existence of de jure conduct. This is one example of that.

THE COURT: I have no problem with that.

But the problem is when she asks the question which she asked as to whether or not in his opinion there is a violation of that order, that is something else. That is an altogether different proposition.

MISS McKINSEY: The objection to that question was sustained.

THE COURT: But you are going right back down to it again.

You are asking him who told him to do it.

MISS McKINSEY: But that doesn't put him personally in jeopardy.

THE COURT: All right. I think it does. And Mr. Peterson feels that way, too.

I am going to protect the witness.

MR. PETERSON: I do. And we would ask for that relief.

THE COURT: I have no question — and I have allowed questions all the way through this case which go to the Board's bad faith. I have no problems with that.

But that is not a criminal proceeding. Contempt is.

MISS McKINSEY: Your Honor, we need a few minutes to consult about this matter.

THE COURT: All right.

You may step down, if you want to, Mr. Kimbrough.

10 minutes.

(Recess.)

THE COURT: We are in session for better or for worse.

All right. Where are we?

MISS McKINSEY: Your Honor, I had the reporter read the last set of questions and there is no pending question, and I understand Mr. Peterson's objection to be to any question on the -- what this witness knew. Who he consulted. How the decision-making process was carried out. What higher officials than he is knew that the schools were becoming larger and remaining segregated minority schoools, and to the extent that that line of inquiry is relevant to show the course of conduct by the Board of Education that leads this court to be confident that the constitutional rights of minorities are not being ignored and that a quality desegregated education for all the district's schools has been provided Crawford states I might be able to follow that line of inquiry.

THE COURT: That is admissible, but the problem is that it has a dual edge in view of your telling me that you will bring a contempt in the future.

MISS McKINSEY: Your Honor, it may be true that the same questions and the answers to those questions would establish contempt, but this witness has been brought here by the Board of Education and he testified on direct examination regarding his course of conduct about the alleviation of overcrowding in the schools.

THE COURT: I have indicated, Miss McKinsey, that you may ask questions having to do with bad faith, but I want to know what your intentions are to use these questions in the future. That is what I want to know.

MISS McKINSEY: Well, Your Honor, it is not — the question, it seems to me, is not what my intention is to do and in the answers to the questions —

THE COURT: Yes, it is, the answers to the questions.

I am asking you, Miss McKinsey —

MISS McKINSEY: Your Honor, the Board is seeking to get the benefit of having this witness's testimony without the detriment to itself of having the testimony fully explored.

THE COURT: Miss McKinsey, the board did not bring up nor did any other party in this case bring up the fact that there was an intentional disregard or an attempt to disregard or possible attempt to disregard Judge Gitelson's order.

You are the one that brought that up.

MISS McKINSEY: That is absolutely true, Your Honor.

But the petitioners and the Integration Project have consistently said the Board is continuing its de jure acts of segregating the schools.

THE COURT: Miss McKinsey, until I am aware that you are waiving any claim as to having this gentleman

held in contempt, I will sustain the objections and I will continue to sustain them.

MISS McKINSEY: Your Honor, I feel I am precluded from asking any questions on the state of mind of this witness or his superiors regarding the proper course of conduct to alleviating segregation in the schools in this district.

THE COURT: In view of your statement to me —

MISS McKINSEY: In view of that, on the authority of Reynolds versus the United States, I am going to seek sanctions against the Board.

And I do request at this time that unless this witness is allowed to answer fully the questions that are asked him about the state of mind of himself and his superiors so that I can show that there is no course of conduct that should give the court confidence that the rights of minority children in this district are going to be protected, unless the Board does that —

THE COURT: No —

MISS McKINSEY: Please, let me finish.

THE COURT: No. I shall Not.

I have asked you at this point as to whether or not you intend to proceed with contempt against the Board.

MISS McKINSEY: Your Honor —

THE COURT: I am asking you that, Miss McKinsey. And I am entitled to an answer.

I'll be quite frank with you, if you infer to me and tell me that you are going to proceed with contempt at this point or at any other point, I am going to adjourn these proceedings and allow you to proceed with your contempt.

We will not proceed on the plan because I cannot listen to the plan with the fact of contempt hanging over these proceedings. I cannot proceed in that manner because I will then be foreclosed from hearing the details of the plan because the Board will be hampered in its attempt to present whatever remains of its plan or its case to me because of the threat that it may incriminate itself or the Board members in contempt proceedings.

So I think in order to clear the Board, clear the proceedings, if you intend to go with the contempt citation at this point, I will ask you to file it.

I will then recess these proceedings and we'll hear the contempt.

After the contempt is over, we'll proceed with the rest of the plan. That is my order.

MISS McKINSEY: If that is my only choice, I have to say that the rights of my clients require that the Board be found in contempt and that I'll seek a contempt citation; however —

THE COURT: These proceedings are now recessed until —

MISS McKINSEY: Could I suggest a compromise?

THE COURT: I think you had better think about one.

MISS McKINSEY: And the compromise is that to the extent that the witness testified on matters regarding his state of mind and the decision-making process that was made that led to the existence of these overcrowded schools and to the extent that I cannot ask him questions on cross-examination because of this threat of contempt of the Board about that, all I need to avoid that problem is that his testimony be stricken in total regarding his — the decision-making process that led to this situation.

THE COURT: I think you better find it. I think you better go through the transcript and tell me what you wish to strike and we will then strike it with specific reference to the —

MISS McKINSEY: I don't think I have any choice, Your Honor.

THE COURT: I don't have any choice either, Miss McKinsey, because if you proceed with the contempt at this point, the Board is hampered and all its witnesses are hampered in giving me full and complete and candid answers to the details of their plan.

The plaintiffs are hampered in their questioning of the Board and their bad-faith proceedings because again of the threat of contempt that hangs over the witnesses' heads.

I am unable to listen to a full cross-examination on the part of the plaintiffs. I could not proceed with the examination of this man under those circumstances, so the only way to handle it, if you feel you have contempt and you wish to proceed with contempt, I will recess the proceedings.

MISS McKINSEY: I would appreciate the opportunity to have the petitioners state anything further that they might have to state on this subject.

THE COURT: That is up to them.

MR. DUFF: I just wanted to say with respect to the waivers of contempt, what the court is asking in our opinion is a little too broad.

THE COURT: You might listen to me out.

If a contempt proceedings is filed, I have absolutely no objection to a new inquiry. But to base it upon a

proceedings which are used for the purposes of examination of a plan in which I am asking for candor of the parties hampers this court.

MR. DUFF: Our feeling is that if the court is asking us to waive, a statement on the record —

THE COURT: I am not asking you. You have not told me that you are bringing a contempt.

MR. DUFF: But if we were to come up on recross and ask the same questions, we would be in the same position I would think.

If we are asked to state that we will not ever seek a contempt against the Board for the establishment of segregated conditions to exist in schools, that is a little broader than we would care to state at this time.

THE COURT: You might indicate to me at the time that you are asking the questions the sole purpose for which the questions are asked.

MR. DUFF: As the questions are asked?

THE COURT: As the questions are asked.

MR. DUFF: That is my problem with what is happening right now is that there is no question that is pending.

THE COURT: That is correct, but I want to stop it before it gets any further.

MR. DUFF: Because I think that probably Miss McKinsey could go into the questions and have the Board state what the extent of their objection is, and if at that point she feels it is in that area she could withdraw her questioning.

THE COURT: I will be quite frank with you. I don't think Miss McKinsey knew she was getting into this.

MR. DUFF: I could be frank with the court, too.

There are several areas in cross-examination of Mr. Kimbrough that I elicited testimony which in my mind establishes that same type of foundation.

THE COURT: That's right, but you didn't directly refer to an order saying, "Did you have knowledge of" or, "What do you think that order said to you about what your actions were?"

MR. DUFF: But I did mention that in my opening and I did intend to do that in my closing argument in this case, not in the context —

THE COURT: I have made my position clear.

You people can work your way out of it any way you want. If you want to do it by limitation of the evidence to particular purposes for which you are asking, it is all right with me.

You can do it by waiver of contempt as to the particular witnesses that happen to be there. I don't care how you do it, but I'm going to be quite frank about it.

I cannot listen to a plan where the Board cannot tell me nor can you freely cross-examine because of the pendency of a possible semi-criminal proceedings.

MR. DUFF. Your Honor, we are prepared to waive any contempt citation against this witness personally. And I think —

MISS McKINSEY: That is the stipulation that I started to state and I thought the petitioners did not join in it.

THE COURT: Again, I will take some time so that we can get this clear and on the record.

I have made myself clear. I can't make myself any clearer.

I'll take some time and wait until you are ready to tell me what you are going to do.

(Recess.)

MISS McKINSEY: Your Honor, we have discussed the issue the court raised. We would request that a limited waiver as to this witness to immunize the witness from prosecution for contempt be ordered and entered in the record and that we be allowed to proceed to ask him questions, and that each question be evaluated as to whether any further protection is required.

MR. PETERSON: Your Honor, with respect to the Board, that does not solve the problem in light of the announced intention of intervenor Integration Project, perhaps petitioners, to pursue a contempt charge against the School Board.

To the extent that Mr. Kimbrough is an agent of the School Board, all of these questions which are questions which would go toward the prosecution of the School Board and in the shadow of that prospect, we think it is inappropriate in these proceedings to engage in that area of questioning and we would, if they intend to have the Board cited for contempt for placing bungalows on overcrowded schools, then we would concur in the court's suggestions that these proceedings be adjourned pending a contempt proceeding with respect to that issue and resumed as soon as that issue has been adjudicated.

THE COURT: Well, I am going to deny your request, Miss McKinsey.

MISS McKINSEY: With regard to any question I might ask this witness?

THE COURT: I want to know why you are asking it.

The problem is this: If I were a witness, I would be terribly careful about answering any questions from now on out.

And I can't conduct proceedings in this manner, in this way, because I am interested in this district. I am interested in the children. I am interested in getting something done by September. I am interested in getting this case to the point of where the uncertainty in this community is resolved one way or the other. And I cannot do it if I suddenly find that the rest of the Board's witnesses at this point find themselves constrained because of possible contempt.

And I want to get it out of the way one way or the other.

MISS McKINSEY: If we agree to immunize this witness, what does he have to fear?

THE COURT: He is an agent of the Board, clearly pointed out by Mr. Peterson.

I have no problem whatsoever with limiting the evidence for the sole purpose for which it is offered, bad faith. I have no problem with that kind of thing.

But I do have a problem where the answer can be used in any manner.

MISS McKINSEY: Well, Your Honor, it seems to me that the Board is seeking to present evidence in a light most favorable to itself.

And that this relevant inquiry is being cut off because the board is invoking the privilege.

THE COURT: I am not cutting it off. You are the one that raised the contempt, Miss McKinsey. You are the one that has to work your way out of it.

The law is quite clear that a person need not incriminate himself.

MISS McKINSEY: And this witness, if he were immunized from prosecution, would not be incriminating himself.

THE COURT: He would be merely incriminating the Board. He is an agent of the Board.

MISS McKINSEY: Your Honor, the Board is on notice from the pleadings that we are asserting their continuing de jure acts of segregating of the schools.

THE COURT: I have no problem with that because in my opinion that falls directlya within the four corners of Crawford. I have no problem with that one.

I have told Mr. Duff and I have told Mr. Rosenbaum and everyone that is involved in this case that I am listening to the evidence as to those issues at the same time that I am listening to the other evidence. And that was made clear at the beginning and at the pretrial proceedings.

I have no problem with that.

But it was never made clear to me that the evidence that would come in during the course of the proceedings would also be used for the purpose of contempt.

That was never made clear to me.

MISS McKINSEY: Your Honor, until you mentioned contempt, it is absolutely true there was no intention to use the evidence for that purpose. And that is the point that seems important to me —

THE COURT: If you want to limit your evidence —

MISS McKINSEY: — that in order to —

THE COURT: To show —

If you want to limit the evidence, fine. I have no problem with that. I have indicated that.

MISS McKINSEY: Your Honor, that is a different thing from saying —

THE COURT: I shan't argue the matter. I have ruled on it.

MISS McKINSEY: Your Honor, Mr. Duff has another suggestion of how we can get across this issue. I am certainly not seeking to have the trial recessed and not to delay any longer.

MR. DUFF: Your Honor, we recognize that the provision for disobedience of a writ of mandate is Section 1097 of the Code of Civil Procedure, which is applicable to the Board, and we would be prepared to waive our right with respect to 1097 based upon this witness' testimony so that we would not use this testimony in any subsequent proceeding under 1097 —

THE COURT: Any objection ot that, Mr. Peterson?

MR. DUFF: — against the Board.

MR. PETERSON: In other words, what Mr. Duff if saying is that any testimony adduced from Mr. Kimbrough would not —

THE COURT: Would not be used in a 1097 proceeding.

MR. PETERSON: Would not be used in support of a contempt proceeding under CCP Section 1097.

THE COURT: That is correct.

MR. PETERSON: And I would assume that there are no other provisions pursuant to which a contempt proceeding would be brought, but I would assume that t would go to any other — any contempt proceeding in any fashion.

MR. DUFF: Yes.

MR. BARTMAN: Your Honor —

THE COURT: Just a minute.

Unless you have someone who might be in contempt of the client.

MR. BARTMAN: Your Honor, but the court raised, I think, as the underlying purpose of this discussion is a fear on the court's part that an overhang of potential contempt proceedings may taint the candor of potential witnesses in this case, and the question that I have for Mr. Duff, if I may be permitted —

THE COURT: You may address it to me.

MR. BARTMAN: The question in my mind is whether a waiver of the use of Mr. Kimbrough's testimony solves that problem.

Petitioners and Integration Project would still retain the ability to use, in effect, the leads or the evidence itself, not the transcript, in effect, for questioning of other witnesses.

THE COURT: Well, that is part —

MR. BARTMAN: It is the entire Pandora's Box of contempt which has been opened now, which I think we are going to have to put back on. Otherwise, the problem which the court raised of the tainting of the proceedings might be a very real problem.

THE COURT: I am willing to accept the solution of Mr. Duff, Mr. Peterson. We can take that up as to each witness as it comes in.

Are you willing to accept the suggestion as to this witness?

MR. PETERSON: As I understand it, we are talking about anything Mr. Kimbrough says would not be used in any contempt proceeding against either Mr. Kimbrough or the Board?

THE COURT: Or the Board.

MR. PETERSON: And that we would take up a similar —

THE COURT: Take up a similar stipulation.

MR. PETERSON: With respect to any subsequent witnesses?

THE COURT: If they want to give it, fine. If they don't, they don't.

MR. PETERSON: But that it is my further understanding that the petitioners and Integration Project do intend to pursue a contempt remedy?

MISS McKINSEY: Would that stipulation require that if this witness or any future witness were actually called in contempt proceedings and testified differently from how they testified here that their testimony could not be even used for impeachment?

THE COURT: That is correct.

That is my interpretation.

MR. DUFF: We concur, Your Honor.

MISS McKINSEY: I have difficulty accepting that part of the stipulation.

However, it is not my purpose to question Mr. Kimbrough in order to support a contempt proceedings, so if it is acceptable to go on from that now and to come back to that issue at the proper time —

THE COURT: It is up to Mr. Peterson.

MISS McKINSEY: — I will do so.

MR. PETERSON: Your Honor, I am a little leery about this whole area.

Perhaps another way out might be to have petitioners and Integration Project waive contempt proceedings and seek whatever relief they might seek in the form of the order from this court with respect to integration and the implementation of future integration plans in this school district. It seems to me —

THE COURT: I don't know if they are listening to you.

MISS McKINSEY: I am listening, Your Honor.

MR. ROSENBAUM: I am sorry.

MR. PETERSON: It seems to me that is really what we are talking about. And the concern is that the district not engage in the future in practices which they may have engaged in in the past, even since the Gitelson findings.

And I think to the extent — and they want you to draft an order that would essentially preclude the Board from engaging in that type of conduct; that that really satisfies the mandate of Crawford and gives them the relief they are looking for.

And I think it would void this whole proceeding if they would waive, since, as Miss McKinsey said, the thought of contempt just occurred to her after you brought it up, if they would waive contempt.

THE COURT: I'll see counsel in chambers off the record.

(A conference was held in chambers, not reported.)

(At 2:30 p.m. an adjournment was taken until Thursday, January 10, 1980, at 10:00 a.m.)

APPENDIX K

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. C 822 854

MARY ELLEN CRAWFORD, ETC., ET AL.,
PETITIONERS,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
RESPONDENT.

APPLICATION FOR MODIFICATION OF ORDERS

Pursuant to Article 1, Section 7(a), as amended, of the California Constitution, respondent Los Angeles City Board of Education requests that this Court's orders of February 7, 1978, and May 30, 1979, be modified to eliminate those portions of the desegregation plan implemented pursuant to those orders which require the mandatory reassignment of pupils for the purposes of desegregation.

Article 1, Section 7(a) of the Constitution was amended by the enactment of Proposition 1 on November 6, 1979. That measure, which both the Senate and the Assembly had passed, and which received 69% of the vote count statewide and 74% in Los Angeles County, provides in part that

> "no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal

Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

"Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil tranportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification."

Article 18, Section 4 of the California Constitution provides:

"A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise . . ."

Proposition 1, which does not "provide otherwise," became effective on November 7, 1979.

Because of the overwhelming legislative and public support which Proposition 1 received, the Board on November 8, 1979, voted 5-1 to seek to modify this Court's orders to conform to Proposition 1's terms.

We recognize that this application raises several issues which the parties and this Court must now address. These include:

1. The constitutionality of Proposition 1. (The Board does not raise this threshold issue, but petitioners have in the past indicated that they might do so.)

2. Whether this Court, applying the facts as they exist today, could properly determine that the Board had violated the Equal Protection Clause of the 14th Amendment to the United States Constitution and could, under federal decisional law, impose by reason of any such violation a remedy involving mandatory pupil school assignment or transportation. This issue includes two subparts:

   a. The nature and effect of Judge Gitelson's 1970 Findings of Fact and Conclusions of Law in this action.

   b. What additional proceedings must occur before this Court can determine whether a violation of the Equal Protection Clause has occurred.

3. Whether the current remedy proceedings should be suspended or continued pending the resolution of the foregoing issues.

This list may not be exhaustive.

Briefly stated, the Board contends that Proposition 1 is constitutional, that the Board has committed no *de jure* violation of federal law, that Judge Gitelson's findings do not support a conclusion of *de jure* violation, and, in all events, they are neither *res judicata* nor the law of this case, and that this Court must hold a hearing to determine whether a federal court, sitting today, would find a *de jure* violation and impose a remedy involving pupil school assignment or pupil transportation.

The Board requests that a briefing schedule be established with respect to the foregoing issues and any others which relate to the effect of Proposition 1 on this action. Since the Board is under an obligation under *Crawford* to implement a desegregation plan and since even a finding of systemwide *de jure* violations would require a remedy hearing and a consideration of alternative plans, the Board proposes that the remedy proceedings continue while briefs on the foregoing issues are being prepared, until such time as, and if, they may need to be interrupted for a hearing on the issue of liability under federal law.

Dated: November 13, 1979.

Respectfully submitted,
McCUTCHEN, BLACK, VERLEGER & SHEA
G. WILLIAM SHEA
PETER W. JAMES
DAVID T. PETERSON
MICHAEL M. JOHNSON
JUDD L. JORDAN
JERRY F. HALVERSON

By G. WILLIAM SHEA
Attorneys for Respondent

STATEMENT RE SERVICE

Parties attending the hearing on November 15, 1979, will be served by hand.

APPENDIX L

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Case No. C 822 854

MINUTE ORDER

MARY ELLEN CRAWFORD, etc., et al.,
PETITIONERS,

VS.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
RESPONDENT.

The board's motion of November 15, 1979, joined by Bustop, for modification of the court's orders of February 7, 1978, and May 30, 1979, to eliminate the portion of such orders requiring mandatory assignment of pupils for the purpose of desegregation is denied. The finding of this court in 1970 that the respondent board participated in racial discriminatory practices which led to the segregation of the Los Angeles Unified School District was expressly affirmed by the opinion of the California Supreme Court in *Crawford v. Board of Education,* 17 Cal.3d 280, at p. 285:

> "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature."

The remedy required by *Crawford* is not inconsistent with the remedy required by the United States Supreme Court in *Dayton Board of Education v. Brinkman,* ____ U.S. ____, 61 L.Ed.2d 710, 99 S.Ct. 2971 (1979), and *Columbus Board of Eduction v. Penick,* ____ U.S. ____, 61 L.Ed. 666, 9 S.Ct. 2941 (1979), in similar findings and situations. To cite the history of judicial remedial desegregation orders where de jure acts have been found to cause school segregation requires citation to a myriad of federal cases. However, reference is made to *Swann v. Charlott-Mecklenburg Board of Education,* 402 U.S. 1, 28 L.Ed.2d 554, 91 S.Ct. 1267 (1971), as the definitive statement of remedies available to a federal court under the Fourteenth Amendment to the United States Constitution.

The provision under the so-called Robbins Amendment of Article I, Section 7(a), of the California Constitution requiring modification of existing judgments and orders to conform to the federal cases and United States constitutional requirements would, even if constitutional, not change the terms of the mandate previously issued herein, as that mandate and the federal obligations under federal case law are not inconsistent and require identical remedies.

Petitioners in opposition seek to have the amendment to Article I, Section 7(a) declared unconstitutional. The mandate in this case, as affirmed by the California Supreme Court, requires the same results as would be required under the same set of facts in the federal court decisions and the request for such declaration is moot and will be denied.

The motion by the board to strike the unofficial records and documents heretofore filed by the petitioners in opposition to modify is made moot by the above ruling.

Dated: May 19, 1980.

PAUL EGLY
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NO. 822 854

MARY ELLEN CRAWFORD,
A MINOR ETC., ET AL.,
PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
RESPONDENT,

BETTER EDUCATION FOR STUDENTS TODAY;
BUSTOP, A CORPORATION;
CHARLES DREEBIN, ET AL.;
ROBERT M. LOVELAND and MARY KEIPP,
INTERVENORS.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MINUTE ORDER OF MAY 19, 1980

By motion filed November 15, 1979, during proceedings resulting from this Court's judgment of May 12, 1970 requiring the Los Angeles Board of Education to present to this Court by July 1, 1970 a Master Plan of Integration that would within a reasonable period of time effect a non-discriminatory unitary school system, respondent Board of Education moved the Court "pursuant to Article I, Section 7(a) ... of the California Constitution," "as amended" by Proposition 1 on the November 6, 1979

California ballot, to modify this Court's orders of February 7, 1978 and May 30, 1979 so as to eliminate from said orders "those portions of the desegregation plan ... which require the mandatory reassignment of pupils for the purposes of desegregation."

Petitioners, supported by intervenors Dreebin, et al, raised the issue as to the unconstitutionality of Proposition 1. Respondents, supported by intervenor Bustop, defended the constitutionality of the Proposition. Briefs supporting the differing points of view were filed by the parties and considered by the Court.

Following the completion, on April 11, 1980, of the proceedings mentioned in the first paragraph hereof, the Court, by way of a minute order dated May 19, 1980, denied respondent's motion and also declined on the ground of mootness, to pass upon the question of the constitutionality of Proposition 1.

Thereafter, respondent Board requested that there be findings of facts and conclusions of law with regard to said minute order. Pursuant to that request, the Court makes the following:

FINDINGS OF FACT

1. In its Findings of Fact and Conclusions of Law dated May 12, 1970, this Court found that respondent Board had been guilty of operating intentionally, de jure and in bad faith a segregated school system.

2. The Court, therefore, on May 12, 1970, ordered the Board to prepare a desegregation plan which would desegregate the school system and make it a unitary system. This was to be done by July 1, 1970.

3. The Board did not comply with that order but instead appealed.

4. The California Supreme Court on June 28, 1976 affirmed this Court's order and remanded the case back to this Court for effectuation of the May 12, 1970 order. (*Crawford v. Board of Education*, 17 Cal.3d 280 [1976]).

5. The Board had not, even yet, complied with the said order. The Los Angeles School System during all those years has remained a segregated, not a unitary, system.

6. Following the aforesaid remand, the Board presented a plan to this Court which failed to comply with the writ of mandate and was so held by this Court. (Minute Order of July 5, 1977).

7. The July 5, 1977 order required the Board to, within 90 days, present another plan to this Court which would comply with the writ of mandate and which would realistically commence the desegregation of the district by no later than February, 1978.

8. The Board failed to so do. Instead it presented a proposed plan (Exhibit 000 or Plan II) which this Court in the aforementioned February 7, 1978 order, held was not in compliance with the mandate but which this Court held was an important initial first step toward eventual compliance with the writ. This plan contained some element of mandatory reassignment of students for desegregation purposes. Though held to be not constitutionally sufficient, this Court in the February 7, 1978 order permitted the Board to go forward with the partial and insufficient plan with the proviso that by December 31, 1978 the Board again present to the Court amendments and modifications to remedy the insufficiencies in order to complete "the [Board's] long delayed journey toward its stated goal of full racial integration of the district and . . . compliance with the court's mandate."

9. On March 16, 1979, respondent Board filed with the Court documents purporting to be in response to the

February 7, 1978 order. Trial of the validity of the plan, consisting of that which the court had permitted to be started by its February 7, 1978 order as modified by the Board's March 16, 1979 submission, was to begin on June 4, 1979.

10. Prior to June 4, 1979, respondent Board moved the Court for a continuance of that trial date. The motion was heard on May 30, 1979. It was pursuant to that hearing that the minute order of May 30, 1979 respondent Board seeks to modify was issued.

11. In said minute order of May 30, 1979, the trial date of June 4, 1979 was vacated. Trial eventually began on October 22, 1979 and completed on April 11, 1980 as above mentioned. As a condition of the vacation of the June 4, 1979 trial date, the May 30, 1979 order provided "because the Court ... has not heard or listened to the amendments [to Plan II] and the objections thereto ... in order to maintain the status quo pending the continued hearing" that the Board "maintain the desegregation operation as nearly as possible without change pending the hearings." This continued in effect the mandatory assignments referred to above in Paragraph 8 of these Findings.

12. During the aforementioned trial, the Board abandoned its Plan II and the amendments and modifications thereto and sought leave to institute a so-called all voluntary plan with no mandatory assignments for desegregation. In a separate order this Court has found that the so-called all-voluntary plan does not comply with the desegregation mandate of this Court.

13. As heretofore found, respondent Board has not yet complied with the 1970 order of this Court requiring the Board to change the Los Angeles Unified School District

from a segregated district to a unitary district. The district remains a segregated district.

14. Should any of the above findings of fact be deemed a conclusion of law, such conclusion of law is hereby made.

From the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Facially, Proposition 1 on the November 6, 1979 ballot amending Article I, Section 7(a) of the California Constitution requires the California Courts to apply federal law in school desegregation cases.

2. A federal court order requiring a school board which has been found guilty of operating de jure a segregated school system to desegregate the system and in so doing to employ mandatory non-neighborhood assignments, is within the power of the Court. (*Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 28 L.Ed.2d 554, 91 S.Ct. 1267 [1971]).

3. A board of education which operated in the past a de jure segregated school system has been since that time and is now under a continuing federal constitutional duty to desegregate that segregated system. (*Columbus Board of Education v. Penick,* ____ U.S. ____, 61 L.Ed2d 666, 99 S.Ct. 2941 [1979]; *Dayton Board of Education v. Brinkman,* ____ U.S. ____, 61 L.Ed.2d 710, 99 S.Ct. 2971 [1979]). If it has not done so, a federal court order requiring it now to do so is within the power of the court. (*Id.*)

4. To the extent that this Court's order of February 7, 1978 and May 30, 1979 require the Los Angeles Board of

Education to employ mandatory, non-neighborhood assignments as part of the methods of desegregating its de jure segregated system, such orders are within the meanings of the *Swann, Penick* and *Brinkman* cases, *supra.* Said orders are not, therefore, inconsistent with the amended Article I, Section 7(a) of the California Constitution, nor is this Court's order of May 12, 1970 nor that of the California Supreme Court of June 28, 1976. The remedy required by all is the same.

5. The provision of Proposition 1 requiring modification of existing judgments to conform to federal cases and constitutional requirements, does not, therefore, change the previously issued mandate nor require any change in the orders made pursuant thereto.

6. Respondent Board's motion to modify the February 7, 1978 and the May 30, 1979 order should, therefore, be denied.

7. For like reason petitioner's request that Proposition 1 on the November 6, 1979 ballot amending Article I, Section 7(a) of the California Constitution, be declared unconstitutional should be denied as being moot.

8. Should any of these conclusions of law be deemd a finding of fact, such finding of fact is hereby made.

DATED: _____, 1980.

_____

Judge, Superior Court

PROOF OF SERVICE BY MAIL

I, the undersigned certify that I am a citizen of the United States, a resident of the State of California, County of Los Angeles, over the age of 18, and not a party to the within entitled action; my business adress is 633 South Shatto Place, Los Angeles, California 90005.

On June 18, 1980 I served the within PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW RE MINUTE ORDER OF MAY 19, 1980 on the interested parties in said action or their attorneys by depositing a true copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in a United States Post Office facility regularly maintained by the Government of the United States at Los Angeles, California, addressed to each of said parties or their attorneys as follows:

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I am employed by Fred Okrand a member of the bar of this Court and a member of the State Bar of California, at whose direction the service was made.

Executed at Los Angeles, California on June 18, 1980

/s/ COLLEEN CHIKAHISA
Colleen Chikahisa

APPENDIX M

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Case No. 822 854

MARY ELLEN CRAWFORD, A MINOR etc., et al.,
PETITIONERS,

VS.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
RESPONDENT,

BETTER EDUCATION FOR STUDENTS TODAY;
BUSTOP, A CORPORATION;
CHARLES DREEBIN, ET AL.;
ROBERT M. LOVELAND AND MARY KEIPP;
UNITED TEACHERS/LOS ANGELES,
INTERVENORS.

ORDER RE FINAL APPROVAL OF SCHOOL BOARD DESEGREGATION PLAN AND DISCHARGE OF WRIT OF MANDATE

More than 18 years have passed since this class action was filed seeking desegration of the schools of the Los Angeles Unified School District. All facts material to the case have changed since the case was filed in 1963. Even the nomenclature employed has become outdated, misleading and harmful to innocent children. Educational

quality has been displaced as the prime focus of public attention. There must be a commitment to excellence in education to fulfill the expectations of all children in the District.

A case that involves the education of children must be resolved. There must be finality in the law so that the people may plan their everyday lives to conform to the requirements of the law.

The time has come for common sense to return to the treatment of desegregation in the public schools. The framework of law is provided by the guidelines given this court in the decisions in this matter rendered by the Supreme Court and the Court of Appeal and each of them.[1]

These decisions place a duty upon the trial court to oversee a process of desegregation planning wherein the Board of Education elected by the people is the primary planner.[2] The law precludes judicial intervention in the planning and/or implementation process "even if [the Court] believes that alternative desegregation techniques may produce more rapid desegregation" (*Crawford* I at p. 306), so long as a plan developed by the elected Board of Education utilizes reasonably feasible steps to produce "meaningful progress in light of present conditions."[3] The

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[1]*Crawford v. Board of Education,* 17 C.3d 280 (June, 1976), hereinafter referred to as Crawford I, and 113 Cal.App.3d 633 (Dec. 1980), hereinafter referred to as Crawford II.

[2]*Crawford* I, *supra,* at p. 305. The Supreme Court said: "Under these circumstances, local school boards should clearly have the initial and primary responsibility for choosing between these alternative methods."

[3]*Crawford* II, *supra,* at p. 649. The Court of Appeal quoted the Supreme Court as follows: " '. . . *so long as a local school board initiates and implements reasonably feasible steps* to alleviate school

Board is under a constitutional duty to undertake reasonably feasible steps to alleviate school segregation, regardless of cause.[4]

The respondent Board has submitted to the court a "Plan for Desegregation," dated July 2, 1981. After review and consideration of the plan submitted and the entire record, and each of them, the Court has determined that certain principles should govern the operation of the plan as set out below. The function of a trial court is to apply the law. This court will follow the law, recognizing its responsibility to protect all the children in the District. The law imposes on the trial court "a duty to supervise the preparation and implementation of a reasonably feasible desegregation plan."[5]

The Court, having reviewed and considered the entire record in this matter, and having considered the various memoranda, evidentiary, and informational matters submitted by the parties, and further having considered argument of all counsel and all of the above, and each of them, makes the following order:

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segregation in its district, and so long as such steps produce meaningful progress [4] . . . *we do not believe the judiciary should intervene in the . . . process . . . . Reliance on the judgment of local school boards in choosing between alternative deesegregation strategies holds society's best hope for the formulation and implementation of desegregation plans* which will actually achieve the ultimate constitutional objective of providing minority students with the equal opportunities potentially available from an integrated education.' (*Crawford* I, *supra,* at pp. 305-306.)" The Court of Appeal stated, "We interpret that phrase to mean *meaningful progress in light of present conditions. A genuine opportunity to show such progress under a plan of its own has not yet been afforded the Board.*" (fn. 4) (Emphasis supplied)

[4]*Crawford* I, *supra,* pp. 301-302, *Crawford* II, p. 651.

[5]*Crawford* II, *supra,* p. 651.

1. The District may proceed to construct new schools and to build additions to existing schools as overcrowding and other needs require.

2. The definition of groups used in the plan is ordered changed forthwith to end the use of terminology classifying Black, Hispanic, and Asian children, as well as those of other non-Anglo ancestries, as "Minority" students.

   This usage is factually incorrect. These students in fact comprise the vast majority of the school population.[6]

   To label a group a minority when it is a majority is harmful to those children. Facts, as opposed to labels, are not harmful to children. Society expects and demands factual representations by educators and elected School Boards.

   It is the duty of the Board and the District, and each of them, to use factual descriptions. They must reflect the current composition of the student population for the applicable school year. The Board and the District, and each of them, are ordered forthwith to use words that honestly reflect the facts as they exist in the current school year. The Court will refer to the facts as they are in the real world.

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[6] *Crawford* II, *supra*, p. 642, fn. 2: "In October 1980 the composition of the student population was White 23.7 percent, Black 23.3 percent, Hispanic 45.3 percent, Oriental and other 7.7 percent. The number of white pupils in grades K-3 had fallen to 16.1 percent." Compare the above with the outdated statistical composition upon which the case was first argued: "In 1968 the racial and ethnic composition of the students was 53.6 percent white, 22.6 percent Negro, 20 percent Hispanic, and 3.8 percent Oriental and other." *Crawford* II, *supra*, p. 642 (fn. 2).

> The facts are that students previously called the "minority" are actually the "majority." Therefore, these students will hereinafter be referred to as "Black," "Hispanic," or "Asian and Other," as appropriate. History does change, and when it does it must be reported accurately.
>
> The use of the term RIMS (Racially Isolated Minority Schools) shall cease forthwith. Use of this label is deceptive, demeaning and inaccurate.
>
> The District is ordered to use a neutral term in its place. The neutral term shall not utilize the word "minority."
>
> The old labels are harmful to the self esteem of the very children this action purports to protect.[7]

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[7]Crawford II, p. 648. The Court of Appeal quoted the Supreme Court as follows: "In a school district in which "minority" students significantly outnumber "majority" students, a school whose racial composition might in some other district make it a "segregated school" may not warrant that legal characterization. (fn. 1) (Crawford, p. 304, fn. 16)." The Court of Appeal went on to say: "That of course is the existing situation in the District, where white students are now a minority in that they comprise 23.7 percent of the total student population and 16.1 percent of grades K-3. Yet for the purpose of applying the legal principles related to school segregation, whites are still designated as the "majority" and segregation is viewed in terms of the minorities, or any one of them, being isolated from whites. (fn. 3)" The court said further, in footnote 3, "That approach appears to be a hangover from the historic situation in some areas in the country which produced the background against which the decision in *Brown v. Board of Education, supra,* was rendered. The wisdom of, or the need to, perpetuate that approach here is questionable since, when considered in terms of the ethnic composition of the Los Angeles Unified School District, it appears to denigrate the dignity and capability of the minority students. In effect, it implies that ethnic "Minority" children, even when they

3. All new elementary and junior high school Magnet schools and programs established under this plan will be located in the areas of predominantly Hispanic, Black, or Asian and Other enrollment.

4. The pupil-teacher ratio in predominantly Hispanic, Black, or Asian and Other schools operated under this plan must be maintained at 27:1 or less in order to enrich the opportunities for students.

5. All Hispanic, Black, Asian and Other pupils who volunteer are entitled to access to all programs involving the voluntary transfer of students.

6. The Board of Education is ordered to publicize the transfer options open to pupils in areas where most Hispanic, Black, or Asian and Other families reside.

7. The District must issue annual reports on educational conditions and achievement in predominantly Hispanic, Black, or Asian schools and distribute these reports to parents and students and each of them.

8. The share of desegregation expenditures allocated to payment of administrative expenses shall not exceed the administrative expense ratio characteristic of the District's overall budget.

9. The District shall prepare, and make public on or before July 15, 1983, a full report of the measures taken and results achieved under its Plan. The report shall focus on whether the Plan has achieved meaningful progress toward the goals set forth in *Crawford* I and II, and each of them,

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constitute a numerical majority and thus do not suffer the psychological trauma of deliberate isolation, cannot achieve best results except in the presence of a token number of white students."

within the constraints exerted by present conditions.

A genuine opportunity must be given to the Board to show progress *under present conditions.* The Court finds that the Board has embarked on a course of action that under present conditions seeks to realize the hope of society and alleviate the various harms to the children in the District. After the balancing and reconciliation of many competing values, the Court finds that the Plan, as ordered changed by the Court, will protect the rights of all students and meet Constitutional standards.

The time has come to end these proceedings. There must be finality in the law. The mandate to take reasonably feasible steps to desegregate the District is clear. The Board remains subject to its constitutional duty under State law to undertake reasonably feasible steps to alleviate school segregation regardless of cause. There are matters which deeply concern the Court in respect to the instant litigation. However these concerns should not be made the springboard for examination of procedures which implement the new Plan. The underlying issues have been resolved. Judicial intervention is no longer appropriate. The people, who are the ultimate authority, must look to the School Board, as their elected representatives, to continue to discharge its duty under the law.

The Court finds that respondent Board of Education has satisfied the mandate of the Court issued May 19, 1970, interpreted in light of the opinions expressed by the Supreme Court in *Crawford v. Board of Education* (Crawford I), *supra,* and the Court of Appeal in *Crawford v. Board of Education* (Crawford II), *supra,* and each of them, and, so finding, orders the writ discharged.

All oustanding Orders of the Superior Court in this matter, save the Minute Orders re Court Monitors, are

vacated, effective this date. The Court retains jurisdiction for the sole purpose of determining the matter of attorneys' fees.

September 10, 1981

JUDGE ROBERT B. LOPEZ

APPENDIX N

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. C 822 854

MARY ELLEN CRAWFORD, ETC., ET AL.,
PETITIONERS,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
RESPONDENT.

FINAL ORDER TERMINATING JURISDICTION

RULINGS ON MOTIONS RE ATTORNEYS' FEES AND COSTS

The petitioners are the prevailing party in this case. A judgment was obtained in favor of petitioners on May 12, 1970. Six years later it was affirmed by the Supreme Court on June 28, 1976.[1] Over the next five years a plan was evolved pursuant to the judgment and finally adopted September 10, 1981.

The School Board is the losing party in this case.

I

BACKGROUND

Common sense and the law must still govern this litigation even though it is over 18 years old.

This case can best be thought of in two parts.

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[1] *Crawford v. Board of Education* (1976) 17 Cal.3d 280 (*Crawford I*)

Part one related to the trial of the right of the children to a desegregated education and the duty of the Board to provide it. The judgment in favor of petitioners was affirmed by the Supreme Court in 1976.[2] Attorney fees and costs for part one were granted and paid in 1976.

Part two related to the enforcement of the judgment. This is the only part that is the subject of the instant motions for attorneys' fees and costs.

Since 1976, this case has been in the remedy enforcement phase. The sole task before the Court was the supervision of the evolution and adoption of a Plan for desegregation. No rights were at issue.

In 1977, after affirmation of the judgment and without reference to any specific legal rights,[3] several parties sought to intervene in the action. There were no party intervenors prior to judgment.[4]

Normally, *intervention after judgment is not permitted,* except where necessary to preserve or enforce a right not

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[2]*Crawford I,* supra, citing *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876.

[3]Code of Civil Procedure Section 387 permits intervention, "upon timely application" by "any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an *interest* against both . . . " [emphasis added]. *Black's Law Dictionary* defines "interest" as "a *right* to have the advantage accruing from anything" [emphasis supplied].

[4]*Crawford I,* supra, was decided June 28, 1976; all intervenors with the exception of UTLA were permitted to intervene in early 1977 following a writ of mandate issued by the Court of Appeal on April 14, 1977, directing the trial court to grant Bustop's motion to intervene. (*Bustop v. Superior Court,* (1977) 69 Cal. App.3d 66.) UTLA was admitted September 25, 1979, following another writ issued September 17, 1979.

otherwise protectable,[5] and then only where a strong showing is made. *None of the complaints in intervention asserted a specific legal right requiring protection.*[6] *The existence of the right was established without assistance from the intervenors and prior to their intervention.*

The intervenors, and each of them, merely sought to influence *the method* by which the Board complied with its *previously-established legal duty.* The method of enforcement of a court order is within the sole broad equitable discretion of the issuing trial court. *The intervenors, and each of them, were in effect acting simply as friends of the court.* As a *"Functional amicus"*, each intervenor assisted and advised the Court in its task of enforcement.[7]

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[5]*Allen v. Calif. Water & Tel. Co.* (1947) 31 Cal.2d 104, 107; exceptions would include intervention where a new trial has been ordered, or to vacate a default affecting the interest of the intervenor, or to appeal a judgment affecting such an interest that would not otherwise be appealed. In all cases the intervenor must assert some protectable *right.* See also Witkin, *Calif. Procedure* (2d ed) p. 1875 et seq.

[6]After the passage of Proposition 1 on November 6, 1979, and without amending its pleading, intervenor Bustop asserted as a legal right the lack of power of the Court to order mandatory pupil assignment and transportation. The basis for this right did not exist at the time of intervention in 1977.

[7]*Black's Law Dictionary* defines amicus curiae as "[a] friend of the court * * * a person who has no right to appear in a suit but is allowed to introduce argument, authority, or evidence to protect his interests." It "[i]mplies friendly intervention of counsel to remind the court of legal matter which has escaped its notice, and regarding which it appears to be in danger of going wrong." (Citations omitted.)

Perhaps, *but only under appropriate circumstances,* a capacity between an amicus and a full party is needed, with a right to offer evidence and cross examine, but no right to appeal or recover fees or costs.

II

THE TESTS FOR ENTITLEMENT TO FEES

Entitlement to attorneys' fees in this action is governed by the law relating to private attorneys' general, as codified by Code of Civil Procedure Section 1021.5[8] Section 1021.5 specifies seven conditions precedent to entitlement that are relevant here:

1. NECESSITY. "[T]he *necessity* . . . of private enforcement [is] such as to make an award appropriate."

2. IMPORTANT RIGHT. The action must result in "the enforcement of an *important right* affecting the public interest." The Court considers the right of children to attend desegregated schools to be such a right.[9]

3. SUCCESSFUL. The party seeking to recover fees must be a *successful* party. The Court interprets

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[8]*Woodland Hills Residents Association, Inc. v. City Council* (1979) 23 Cal.3d 917, 938, 943. Code of Civil Procedure Section 1021.5 states in full:

> "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

[9]*Brown v. Board of Education* (1954) 347 U.S. 483; *Woodland Hills*, supra, at p. 936.

this to mean that the party seeking to recover fees must have substantially achieved the purpose for which the complaint or complaint in intervention was filed.

4. AGAINST OPPOSITION. The party upon whom liability for fees is sought to be imposed must be an *opposing* party. The Court interprets this to mean a party whose opposition is substantial, and/or whose opposition necessitated the filing and/or prosecution of the complaint or complaint in intervention.

5. SIGNIFICANT BENEFIT. A "significant benefit" must be "conferred on the general public or a large class of persons." The evolution and adoption of a plan for desegregation of the schools is such a benefit.[10]

6. FINANCIAL BURDEN. "[T]he . . . *financial burden* of private enforcement [is] such as to make an award appropriate."

7. NOT A PUBLIC ENTITY. The party seeking to recover fees cannot be a public entity.[11]

III

APPLICATION OF THE TESTS TO THE PARTIES REQUESTING FEES

Six of the seven parties in the instant action have requested fees in the total amount of $2.6 million. The seventh is a public entity which is precluded by law from collecting fees. Of the seven parties, only one is entitled to fees.

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[10]Crawford v. Board of Education (Crawford I), supra; *Crawford v. Board of Education* (1980) 113 Cal.App.3d 633 *(CrawfordII)*.

[11]See Government code Sections 811.2, 6300.

When the motions of the parties, and each of them, for fees are considered in light of the conditions established by Code of Civil Procedures Section 1021.5, it becomes apparent that only the petitioners are entitled to an award. At least one of the conditions is not satisfied for each of the other parties.

The entire purpose of the remedy enforcement phase was to enforce the right of the children to attend desegregated schools. This is clearly the kind of "important right" conferring a "significant benefit" "on the public or a large class of persons" contemplated by Section 1021.5.

But to recover fees, it is not sufficient that a party enforce an important right, even if the enforcement is successful against an appropriate opposing party, as it was here. To recover fees, there must have been a *necessity* that the party seeking fees undertake enforcement of the important right.

Necessity, and not participation, is the basis for fees. *Restraint must be exercised in expending funds allocated for the education of children.*[12] Where a right is being adequately enforced by one party, further enforcement by other parties, while possibly *beneficial,* is not *necessary* so as to justify a fee award.

In this case, the petitioners undertook to enforce the right of children to attend desegregated schools. Private enforcement was necessary because no governmental agency acted to enforce the right at issue. In fact, the action proceeded against the only governmental agency

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[12]"[T]he trial court, utilizing its traditional equitable discretion (now codified in § 1021.5), must realistically assess the litigation and determine, from a *practical perspective,* whether or not the action serves to vindicate an important right so as to justify an attorney fee award under a private attorney general theory." (*Woodland Hills,* supra, at p. 938; emphasis supplied.)

that bears responsibility for the school desegregation process.[13]

The petitioners have unfalteringly continued to pursue all available avenues to enforce the right won by judgment in 1970. Even if none of the parties allegedly seeking to enforce the same right had intervened in the enforcement process, there is no doubt that a plan for desegregation would still have been evolved and adopted. The plan adopted might not have been identical to the plan that actually was adopted, but the right would have been enforced nonetheless.[14]

Thus, the participation of the intervenors was not *necessary* to enforce the right of the children to attend desegregated schools. The right has been adequately enforced at all times by the petitioners.

In addition, several of the intervenors are in reality "functional amici." Traditionally, an amicus curiae is not paid attorney's fees.

There is no basis for differentiating between a *traditional amicus* and a *party* whose *function* is that of an amicus.

Arguably, a second right was enforced during the remedy enforcement phase of this litigation — the "right," if that is the proper legal term, of parents not to

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[13]See *Woodland Hills*, supra, at p. 941, and citations therein.

[14]While it is *beneficial* to have as good a plan as possible, it is legally *necessary* only that the plan implemented contain "reasonably feasible steps to alleviate school desegregation." (*Crawford I*, supra, at p. 305.) As long as these steps produce meaningful progress, judicial intervention is not justified, even if the court "believes that alternative desegregation techniques may produce more rapid desegregation in the school district" (*id.* at p. 306), or be otherwise better or preferable.

have their children subject to mandatory pupil assignment and transportation by court order.[15] It is not necessary to decide if this is the kind of right contemplated by Section 1021.5, however, because even if it is, neither of the two parties who sought to enforce the right meet all the other conditions required for an award.

The Board, as one of the parties, is barred from recovering fees because it is a public entity. Bustop, as the other party, is barred from recovering fees because at all times after the right came into existence by passage of Proposition 1 on November 6, 1979, the Board was actively seeking the same ends as Bustop, and there was no *necessity* for Bustop to further participate in the litigation.[16]

In addition, even if Bustop's participation were necessary, there is no party *against whom* an award would be appropriate. The Board, to whom Bustop appears to be looking for fees, was not an *opposing party* within the meaning of Section 1021.5 at any time during which there actually existed a right for Bustop to enforce.[17] On the other hand, each of those parties that *did* actively oppose Bustop (and the Board) on the mandatory pupil assignment and transportation issue was acting as a private attorney general. Public policy and the provisions of Section 1021.5 all indicate that a fee award *against* a

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[15]The right would seem to actually be a right of *children,* although no child sought to enforce the right.

[16]There is no basis for awarding fees for litigation undertaken *prior* to the *existence* of the right. This is not a common law right that is deemed to have always existed but needed litigation to be recognized. Rather, this is a *statutory right* first created on November 6, 1979.

[17]In fact, *the Board* was the appellant and prevailing party on appeal in *Crawford II,* supra, where the validity and applicability of the right was first established.

private attorney general would not be appropriate. Further, except for petitioners, each of the private attorneys general opposing the Board and Bustop was a *functional amicus.* For the same reason that an amicus is not entitled to recover fees, neither should it be liable for payment of fees to others.

THE PETITIONERS

The petitioners, as they have been throughout this litigation, are the successful party. Judgment was entered in their favor, and against the respondent Board.

The judgment decreed that the Board had a duty to "evolve and adopt a meaningful master plan" for desegregation. Now that such a plan has been evolved and adopted, this litigation is at an end.

The road to adoption has been long and arduous. It has been subject to at least one abrupt change in the governing law, plus other evolutionary changes occurring in the eleven years since the judgment was entered in 1970. Yet is is doubtful that it would have been traveled at all without the presence of the petitioners in the enforcement phase.[18]

DREEBIN, et al, and INTEGRATION PROJECT

Dreeben's participation was extensive, and in many instances creative. From a practical perspective, however, the participation of this intervenor was not necessary to

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[18] *Woodland Hills*, supra, at p. 933. "As we explained in *Serrano III* the fundamental objective of the private attorney general doctrine of attorney fees is 'to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees . . . to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens.' " (Citations omitted; ellipses in original.)

vindicate an important public right. Attorneys fees are not justified.

UNITED TEACHERS OF LOS ANGELES (UTLA)

This intervenor asserted no right. It was not the successful party in obtaining or enforcing the only right at issue in this litigation — the right of children to attend desegregated schools.[19] UTLA sought only to protect the interests of its members. While worthy, the Court finds no significant benefit was conferred *on the public* within the meaning of section 1021.5 by UTLA's participation in the action.

BUSTOP

Bustop did not seek to enforce the right of children to attend desegregated schools, and thus is not entitled to fees relative to that right. Further, Bustop fails to satisfy the conditions necessary to be entitled to compensation for participation in the litigation concerning mandatory pupil reassignment and transporation as indicated above. Thus, no award is appropriate.

LOVELAND AND KEIPP

This party's complaint in intervention does not allege an "important right", or any recognizable right.

The complaint alleges that these intervenors served as members of an advisory committee appointed by the Board to recommend a plan for desegregation. The complaint further alleges that if the plan developed by the committee is not given an "orderly and comprehensive hearing and evaluation by the Board and the District

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[19] *Crawford I*; *Crawford II*, supra, at p. 655.

staff"[20], one intervenor's "credibility with the members of [the committee], as well as with the public, will be undermined"[21], and "the substantial time and effort [the other intervenor] devoted to that Committee will be rendered fruitless"[22], causing these intervenors "corresponding injury".[23] There is no allegation of any legal obligation on the part of the Board to adopt, or even consider, the plan proposed by the committee.

Simply dealing with subject matter that indirectly relates to an important right of another party is insufficient to support an award under Section 1021.5. It is not a "significant right" with the strength or societal importance contemplated by the statute.

Intervenors Loveland and Keipp performed a function not significantly different from amicus curiae. Where a party is in fact a "functional amicus", there is no rationale for awarding fees.

BEST

Like Loveland and Keipp, BEST's participation in the action was in the role of a functional amicus curiae. There was no necessity that it be a party to the action, and no award is appropriate.[24]

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[20]Loveland and Keipp Complaint in Intervention, p. 5, l. 22-23.

[21]*Id.*, p. 6, l. 1-2.

[22]*Id.*, p. 7, l. 11-12.

[23]*Id.*, p. 6, l. 3; p. 7, l. 13.

[24]See Yeazell, "Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case" (1977) 25 *UCLA L. Rev.* 244, 259. A judicial proceeding is not a "town meeting".

IV
METHOD OF CALCULATION OF FEES

Extensive and laborious hearings on the applications for fees have been held since the first application for interim fees was filed in 1978. In addition, each party has submitted voluminous written argument, pleadings, evidentiary material, factual information, and an extraordinary amount of oral argument in support of its application or opposition.[25]

In calculating the appropriate amount to be awarded the Court has chosen to base the award on the fair market value[26] of the services rendered, and then to adjust that figure in light of the circumstances peculiar to this case[27].

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[25]Earlier proceedings to pay interim fees were suspended by order of the Court of Appeal on October 17, 1979. Those proceedings were resumed upon subsequent order of the Court of Appeal on March 12, 1980, declaring the earlier order "improvidently granted." The complexity of the litigation, combined with the long period of pendency, have worked financial hardship on some of the attorneys in this action as well as complicating the task provided the trial court.

The Court suggests that new procedures are needed in cases of this nature. Minimally, each party *potentially* entitled to fees should submit to the Court on a regular basis a detailed accounting of the time spent, the specific nature of the services, and sufficient data to determine the market value of those services *at the time.*

[26]The fair market value base for each attorney for the petitioners was calculated by multiplying the hours claimed to have been worked by a rate that was the lesser of the rate claimed by the attorney and the rate paid private counsel acting in a similar role or capacity for respondent Board.

[27]Some of the factors considered resulted in an increase in the award; others resulted in a decrease. The factors considered were:

(1) the magnitude, complexity and novelty of the litigation;

(2) the nature, quality, and extent of the opposition presented;

(3) the fact that the law changed dramatically with the passage of Proposition 1, and with it the relative rights of the parties in pursuing one of the "scores" of remedies available;

(4) the extent to which one party or another achieved certain results on various issues as the litigation progressed;

(5) the benefit to the successful party as a result of the litigation;

(6) the nature, quality, and extent of the work observed by the Court;

(7) the quality and quantity of time records kept by each of the attorneys seeking fees, which bore upon the Court's ability to ascertain the validity of some of the claims as to amount and nature of work;

(8) the popularity of the cause, and the effect on counsel's professional standing;

(9) the fact that some counsel are salaried employees of privately- or publicly-funded organizations, and that the purpose of compensating attorneys in public interest litigation is not to provide a source of windfall profits to attorneys or organizations that employ them, but rather to ensure that competent attorneys do not decline to undertake this type of litigation because of financial disincentive;

(10) the risks involved and inherent preclusion of other employment;

(11) the fact that some counsel are supported at least in part by public funds received from the Federal government, and that the Federal government is in a better position to distribute the cost of litigation that at least tangentially affects every school district in the United States than is the respondent Board of Education;

(12) the duplication of effort that resulted from the number of parties and attorneys often seeking the same or similar ends on certain issues;

(13) the fact that fees must be paid by an entity responsible for educating children, at a time in history when financial resources are more than normally restricted;

The Court has excluded from the award fees attributable to services whose sole purpose was the recovery of fees.[28]

V

ORDER

The Court, having reviewed and considered the entire record in this matter[29], and having considered the various memoranda, evidentiary, and informational materials submitted by the parties, and further having considered argument of all counsel and all of the above, and each of them, makes the following rulings and final order:

ATTORNEYS' FEES AND COSTS

The Court deems the memoranda of costs filed by the petitioners and respondent and each of them to be motions for an award of Costs.

The motions for awards of attorneys' fees and costs and each of them for petitioners are granted.

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(14) the readiness of the respondent entity responsible for educating children to allocate extensive sums for legal services in resisting the action;

(15) awards in other public interest cases;

(16) public policy.

[28]*Serrano v. Unruh* (1981) 123 Cal.App.3d 573 (*Serrano* IV). The amount excluded was $25,000 for the services of Harold Hart-Nibbrig. This amount was calculated independently but in the same manner as the primary awards. Because the issue under consideration was fees, however, rather than school desegregation, the effect of the factors expressed in footnote 27 was somewhat different in some instances from the effect of those factors on the primary awards.

[29]The record of *filed* documents in this case consists of 55 Court volumes. Forty-eight of those 55 volumes were generated during the remedy enforcement phase.

Petitioners Crawford, *et al,* are awarded reasonable attorneys' fees to be paid by respondent Board of Education in the amounts of $650,000 to the American Civil Liberties Union, $450,000 to Manning, Reynolds and Roberts and Shockley, Duff and Hart-Nibbrig, and $100,000 to the Los Angeles Center for Law and Justice.

The motion of respondent for costs is granted as to item 29 (Judge Fargo) only, and is otherwise denied.[30]

The motion of petitioners to tax the costs bill as submitted by respondent Board of Education is granted as to the entire costs bill except item 29.

The motion of respondent Board to tax the costs bill submitted by the petitioners is denied.[31]

The motion of intervenor Bustop to strike the entire costs bill as submitted by the Board against Bustop is granted.

All other motions for attorneys' fees and costs and each of them are denied.

TERMINATION OF JURISDICTION

All notices and/or reports and each of them required by the September 10, 1981 Order are to be satisfied by public distribution to parents and children of the District and each of them. There is no requirement to file these or any other notice or report with the Court. All orders re court monitors are vacated forthwith.

The duty of the Court is now discharged.

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[30]This item is to be deducted from costs recovered by the petitioners. This expense is recoverable by the Board because it was occasioned by the lact of adequate time records for the time spent by attorneys for the petitioners.

[31]The motion was to strike or tax the entire costs bill.

It is time for the School Board to accept responsibility for its actions. Society has placed its trust and hope in the Board to educate its children.[32] *It is time for the Board to devote its energy to seeking excellence in education for all our children.* This is the ultimate responsibility of the Board. Only the Board can discharge that responsibility.

There must be finality in the law. With this Order, the Court terminates its jurisdiction for any and all purposes and each of them over the case of *Mary Ellen Crawford et al. v. the Board of Education of the City of Los Angeles.*

DATED: November 25, 1981

/s/ R. B. LOPEZ
JUDGE ROBERT B. LOPEZ

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[32] *Crawford 1,* supra, at 305-306; *Crawford II,* supra, at 649.

APPENDIX O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78 2735 MLR

ALFONSO LOPEZ, ETC., ET AL.,
PLAINTIFFS,
VS.
HOWARD MILLER, ET AL.,
DEFENDANTS.

ORDER OF DISMISSAL

On October 16, 1978 defendants' motion to dismiss the complaint in this action came on regularly for hearing before the Court. Plaintiffs were represented by Cliff Fridkis and defendants were represented by G. William Shea, Judd L. Jordan and Jerry Halverson. The Court having read the briefs and heard oral argument of counsel and having concluded that it is necessary and proper to abstain from the exercise of jurisdiction over this action,

IT IS HEREBY ORDERED that the complaint in this action is dismissed.

DATED: October 27, 1978.

/S/ LAURA E. WATERS
MANUEL L. REAL
United States Judge

Approved as to form:

/S/ CLIFF FRIDKIS
CLIFF FRIDKIS
Attorney for Plaintiffs

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3022

ALFONSO LOPEZ, a minor by HORTENSIA LOPEZ, his GUARDIAN AT LITEM; ET AL.,
PLAINTIFF-APPELLANTS,
VS.
HOWARD MILLER, individually and as a member of the Board of Education of the Los Angeles Unified School District; et al.,
DEFENDANT-APPELLEES.

Appeal from the United States District Court for the Central District of California
Manuel L. Real, District Judge, Presiding
Argued and submitted November 3, 1980
Before: CHAMBERS and CHOY, Circuit Judges, and SOLOMON,* District Judge.

ORDER DISMISSING APPEAL

The judgment of dismissal by the United States district court is affirmed.

We are convinced the basis of the district court judgment is abstention, which is the circumstances of this case we hold is correct.

---

*The Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

APPENDIX Q

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Civil Minutes–General

CV-78-2556-R

SIDNEY TRAPP, ET AL.

vs.

LOS ANGELES BOARD OF EDUCATION

DOCKET ENTRY

PRESENT:

HON. MANUEL L. REAL, *Judge*
ANDREW H. NELSON, *Deputy Clerk*
FLORENCE CARCIA, *Court Reporter*
Attorneys Present for Plaintiffs:
JOHN D. WAKEFIELD

Attorneys Present for Defendants:
G. WILLIAM SHEA
JUDD L. JORDAN
JERRY HALVERSON

PROCEEDINGS: HEARING (IN CHAMBERS): APPLICATION OF PLAINTIFF RE T.R.O.

Court and counsel confer. Court orders the application of plaintiff for a temporary restraining order denied.

This matter is continued to September 11, 1978 at 10:00 A.M. for hearing re preliminary injunction.

[SEAL]

APPENDIX R

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 78-2960

D.C. #CV 78-2556R
Central Calif.

SIDNEY D. TRAPP, JR., as GUARDIAN AD LITEM of KRISTIN D. TRAPP, a minor,
PLAINTIFF-PETITIONER

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
RESPONDENT

LOS ANGELES BOARD OF EDUCATION,
DEFENDANT-REAL PARTY IN INTEREST

Before: BROWNING and WALLACE, Circuit Judges.

ORDER

Petitioner Sidney K. Trapp, Jr. requests an emergency order restraining the Los Angeles Board of Education from implementing its busing plan on September 11, 1978. Petitioner alleges that the District Court denied his application for temporary restraining order on August 25, 1978. Since petitioner has not filed a notice of appeal, the Court treats his filings as a petition for writ of mandamus and a motion for stay pending disposition of the petition. The motion and petition are denied without prejudice on the ground that petitioner has not adequately supported his request. For instance, the filings do not contain any opinion or order of the district court or any part of the record as required by Rule 21(a), Federal rules of Appellate Procedure.

APPENDIX S

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Civil Minutes – General

No. CV-78-3265-R

CITIZENS LEGAL DEFENSE ALLIANCE, INC., ETC., ET AL.

v.

THE CALIFORNIA SUPREME COURT, ETC., ET AL.

DOCKET ENTRY

PRESENT:

HON. MANUEL L. REAL,
Judge

ANDREW H. NELSON,
Deputy Clerk

FLORENCE CARCIA
Court Reporter

Attorneys Present for Plaintiffs:
JOHN D. WAKEFIELD

Attorneys Present for Defendants:
G. WILLIAM SHEA
JUDD L. JORDAN
JERRY HALVERSON

PROCEEDING:

HEARING APPLICATION OF PLAINTIFF FOR A PRELIMINARY INJUNCTION.

HEARING RE: JURISDICTION OF THIS COURT.

Court and counsel confer.
Counsel for plaintiff argues matter; counsel for defendants respond. Court orders application for a preliminary injunction denied and dismisses action for lack of jurisdiction and on the ground that plaintiff has no standing in this case.

MD JS-6. ENT 9-22-78 (R)

[Seal]

APPENDIX T

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78 3415 MLR

ERIC A. LINXWILER, ET AL.,
PLAINTIFFS,

V.

STATE OF CALIFORNIA, ET AL.,
DEFENDANTS.

ORDER OF DISMISSAL

On November 6, 1978, the motion of defendants Board of Education of the Los Angeles Unified School District and Los Angeles Unified School District ("the Board of Education") to dismiss the complaint or in the alternative to order joinder of parties under Rule 19 came on for hearing before this Court. Plaintiffs were represented by Bruce D. Abramson; the Board of Education was represented by G. William Shea and Michael M. Jonson; defendants State of California, Edmund G. Brown, Jr. and California Highway Patrol were represented by Thomas Scheere; and represented by Robert V. Cohune and Ellen D. Tiger.

The Court having read the briefs and heard oral argument of counsel and having concluded that it is necessary and proper to abstain from the exercise of jurisdiction over this action,

IT IS HEREBY ORDERED that the complaint in this action is dismissed.

Dated: November 13, 1978.

/s/ MANUEL L. REAL
Manuel L. Real
United States Judge

Approved as to form:

/s/ BRUCE D. ABRAMSON
BRUCE D. ABRAMSON
Attorney for Plaintiffs

/s/ THOMAS SCHEERER
THOMAS SCHEERER
Attorney for Defendants
State of California,
Edmund G. Brown, Jr.,
and California Highway Patrol

/s/ ROBERT V. COHUNE
ROBERT V. COHUNE
Attorney for Defendant
California Department of
Transportation

APPENDIX U

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV80-4129-AHH (KX)

AMY EMIKO KADOMATSU, BY
HER GUARDIAN AD LITEM HIROSHI KADOMATSU,
RENE VILLASENOR, BY HIS GUARDIAN AD LITEM,
SYLVIA MARIA VILLASENOR,
Plaintiffs,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES;
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES;
THE HONORABLE JUDGE PAUL EGLY; EDWARD
HAMILTON;
DR. FRANCINE RABINOVITZ; HRS, INC.,
Defendants.

JUDGMENT
(LOCAL RULE 7; FRCP 58)

This action came on for hearing and trial on the merits before the Court, Honorable A. Andrew Hauk, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered after consolidation of the hearing of the applications or a temporary restraining order and a preliminary injunction with the trial on the merits of the complaint for a permanent injunction, and the Court having made and entered its Findings of Fact and Conclusions of Law herein, and good cause appearing,

It is Order and Adjudged that the plaintiffs take nothing, that the action be dismissed with prejudice on the merits, and that the defendants Superior Court of the State of California for the County of Los Angeles; Board of Education of the City of Los Angeles; the Honorable Judge Paul Egly; Edward Hamilton; Dr. Francine Rabinovitz; and HRS, Inc. shall have judgment on the

complaint and recover of the plaintiffs their costs of action. This judgment is in accordance with the Findings of Fact and Conclusions of Law signed and filed herewith.

DATED: October 6, 1980.

/s/ A. ANDREW HAUK

THE HONORABLE A. ANDREW HAUK,
United States District Judge

APPENDIX V

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
CASE NO.CV80-4129-AAH (KX)

AMY EMIKO KADOMATSU, BY
HER GUARDIAN AD LITEM HIROSHI KADOMATSU,
RENE VILLASENOR, BY HIS GUARDIAN AD LITEM,
SYLVIA MARIA VILLASENOR,
PLAINTIFFS,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES;
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES;
THE HONORABLE JUDGE PAUL EGLY; EDWARD
HAMILTON;
DR. FRANCINE RABINOVITZ; HRS, INC.,
DEFENDANTS.

Findings of Fact and Conclusions of Law
(Local Rule 7; FRCP 52)

On September 18, 1980, plaintiffs Amy Emiko Kadomatsu, by her Guardian Ad Litem, Kiroshi Kadomatsu, and Rene Villasenor, by his Guardian Ad Litem, Sylvia Maria Villasenor ("plaintiffs"), filed a complaint against defendants alleging violation of the Civil Rights Law (42 U.S.C. §§ 1983 and 1985(3)) and seeking injunctive relief as particularly described herein. Concurrently with filing their complaint, plaintiffs filed an Application for Temporary Restraining Order seeking to restrain defendants from "implementing and applying a mandatory bussing plan as presently ordered by the Los Angeles Superior Court, to Playa del Rey Elementary School."

On September 18, 1980, in the above-entitled Court, before The Honorable A. Andrew Hauk, United States District Judge, the Application for Temporary Restraining Order came on for hearing. Sanford Levenberg appeared as attorney for plaintiffs. Nossaman, Krueger &

Marsh, by Charles S. Vogel and Richard D. Fybel, appeared as attorneys for defendants Superior Court of the State of California for the County of Los Angeles, The Honorable Judge Paul Egly, Edward Hamilton, Dr. Francine Rabinovitz and HRS, Inc. McCutchen, Black, Verleger & Shea, by Peter W. James, David T. Peterson and Jerry F. Halverson, appeared as attorneys for defendant Board of Education of the City of Los Angeles. Fred Okrand appeared and was admitted by the Court as amicus curiae for defendants.

On September 18, 1980, the Court read and considered plaintiffs' Complaint, the Application for Restraining Order specifically including the Declaration of Sanford Levenberg and exhibits there to and the Affidavit of Robert P. Shaffer. The Court also heard and considered oral argument of plaintiffs' and defendants' counsel made at the hearing.

In accordance with Rule 52 of the Federal Rules of Civil Procedure and Local Rule 7(a), the Court sets forth int findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiffs are citizens and residents of the State of California, residing within this district and attending Playa del Rey Elementary School within the City and County of Los Angeles.

2. Defendant Los Angeles Board of Education is a department of the municipal government of the City of Los Angeles.

3. The Honorable Judge Paul Egly and the Superior Court of the State of California in and for the County of Los Angeles are, respectively, an employee of and a branch of the government of the State of California.

4. Defendants Dr. Francine Rabinovitz and Edward Hamilton are citizens and residents of the State of California residing within this district and are employees of co-defendant HRS, Inc. Defendants Rabinovitz, Hamilton and HRS, Inc., are the Superior Court's appointed

monitors in connection with the busing plan at issue herein.

5. Plaintiffs in their complaint seek a temporary restraining order, a preliminary injunction and a permanent injunction enjoining defendants from implementing the mandatory busing plan ordered by Judge Egly of the Los Angeles Superior Court as it applies to Playa del Rey Elementary School ("Playa del Rey"). Playa del Rey is an elementary school located in Court Area 5 and was ordered by the Los Angeles Superior Court on August 25, 1980, to be a participant in a busing plan which involves a "cluster" of elementary schools consisting of Castle Heights Elementary School, Richland Avenue Elementary School, Playa del Rey and 54th Street Elementary School. Pursuant to this busing plan, the minority enrollment at 54th Street School will decrease from 100% to 68.4%, according to plaintiffs' Declaration.

6. Classes at Playa del Rey commenced on September 16, 1980. Thus, the hearing herein and plaintiffs' application for injunctive relief by temporary restraining order occurred on the third day of school at Playa del Rey, September 18, 1980.

7. On September 12, 1980, Mr. Justice Rehnquist issued an opinion in his capacity as Circuit Judge for the Ninth Circuit in *Board of Education of City of Los Angeles v. Superior Court of California, County of Los Angeles (Mary Ellen Crawford, real party in interest)*. (49 USLW 3163.) Justice Rehnquist denied the request of The Board of Education of the Los Angeles Unified School District (a defendant herein) to "stay an order of the California Supreme Court, dated August 27, 1980, which left standing an order of [Judge Egly of] the Superior Court of the State of California for Los Angeles County requiring mandatory reassignment of between 80,000 and 100,000 first through ninth grade students attending approximately 165 elementary and junior high schools pending consideration by the United States Supreme Court of its petition for certiorari." (49 USLW 3163.)

8. In Justice Rehnquist's order denying the stay, he reviewed the history of *Crawford v. Board of Education*, 17 Cal.3d 286 (1976). Justice Rehnquist concluded that: "a stay granted less than a week before the scheduled opening of school, when school officials and state courts are still trying to put in place the final pieces of a plan, would not be a proper exercise of my function as a Circuit Justice, event though were I voting on the merits of a petition for certiorari challenging the plan I would, as presently advised, feel differently. The application for a stay is accordingly denied." (49 USLW at 3164.)

9. On September 16, 1980, the California Supreme Court in *Crawford, etc. et al. v. The Court of Appeal, Second Appellate District; Board of Education, City of Los Angeles, et al., Real Parties in Interest,* decided, in pertinent part: "Under this court's decision in Crawford v. Board of Education (1976) 17 Cal.3d 280, on remand of this case it is the trial court, rather than the defendant school board, that has the initial responsibility for supervising the formulation and implementation of a reasonably feasible desegregation plan. Under the circumstances, we find that the trial court's order of September 12, 1980 represents a valid exercise of the court's broad equitable discretion. Accordingly, the petitions seeking to stay the effect of that order pending appeal are denied."

10. There is no probability of success by plaintiffs on the merits in this case.

11. Plaintiffs will not suffer irreparable injury if they are not granted injunctive relief herein.

12. In balancing the equities and hardships, the balances tip very sharply in favor of defendants, and each of them. If the injunctive relief requested was granted, defendants would be put in a terrible and intolerable situation and irreparable and great harm would occur to the Los Angeles School District's school children, minority population, minority school children, the School Board and its staff at this late, intense time.

13. The public interest is best served and requires denial of the injunctive relief requested.

CONCLUSIONS OF LAW

A. The Court concludes in all respects as hereinabove set forth in its Findings of Fact.

B. This action is brought under, and the Court has jurisdiction of this action pursuant to, 28 U.S.C. § 1343(4) and 42 U.S.C. §§ 1983, 1985(3).

C. Plaintiffs' application and prayer for injunctive relief by temporary restraining order, preliminary injunction and permanent injunction, and each of them, should be and is hereby denied in their entirety. *Crawford v. Board of Education,* 17 Cal.3d 280 (1976); the recent decisions by Justice Rehnquist and the California Supreme Court, *supra; Sierra Club v. Hickel,* 433 F.2d 24, 33 (9th Cir. 1970), aff'd. 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Wm. Inglis & Sons Baking v. ITT Cont. Baking Co.,* 526 F.2d 86 (9th Cir. 1975); *King v. Saddleback Junior College District,* 425 F.2d 426, 427 (9th Cir. 1970), *cert. denied,* 404 U.S. 979 (1970); *County of Santa Barbara v. Hickel,* 426 F.2d 164, 168 (9th Cir. 1970); *Sierra Club v. Hathaway,* 579 F.2d 1162, 1167 (9th Cir. 1978); *Kass v. Arden-Mayfair, Inc.,* 431 F.Supp. 1037, 1041 (C.D.Cal. 1977).

D. Plaintiffs and defendants, and each of them, have stipulated and the Court concludes that the applications for temporary restraining order and preliminary injunction may be and are consolidated with this trial on the merits for a permanent injunction. Plaintiffs do not seek damages on this case.

E. Plaintiffs shall take nothing on their Complaint. Defendants Superior Court of the State of California for the County of Los Angeles: Board of Education of the City of Los Angeles. The Honorable Judge Paul Egly; Edward Hamilton; Dr. Francine Rabinovitz; and HRS, Inc., are entitled to judgment on the Complaint and to recover of the plaintiffs their costs of action herein.

Dated at Los Angeles, California, this 6th day of October, 1980.

A. ANDREW HAUK
THE HONORABLE A. ANDREW HAUK
United States District Judge

APPENDIX W

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 80-4130 WMB (JRX)
(Assigned to AAH (KX))

KENT KAISAKI, by his
GUARDIAN AD LITEM MICKEY KAISAKI,
RICHARD DANIEL DE ALBA, by his GUARDIAN AD
LITEM, ROSALIO DE ALBA,
PLAINTIFFS,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES;
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES;
THE HONORABLE JUDGE PAUL EGLY;
EDWARD HAMILTON; DR. FRANCINE RABINOVITZ;
HRS, INC.,
DEFENDANTS.

This action came on for hearing and trial on the merits before the Court, Honorable A. Andrew Hauk, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered after consolidation of the hearing of the applications for a temporary restraining order and a preliminary injunction with the trial on the merits of the complaint for permanent injunction, and the Court hearing made and entered its Findings of Fact and Conclusions of Law herein, and good cause appearing,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action be dismissed with prejudice on the merits, and that the defendants Superior Court of the State of California for the County of Los Angeles; Board of Education of the City of Los Angeles; the Honorable Judge Paul Egly; Edward Hamilton; Dr. Francine Rabinovitz; and HRS, Inc. shall have judgment on the complaint and recover of the plaintiffs their costs of action. This judgment is in accordance with the Findings of Fact and Conclusions of Law signed and filed herewith.

DATED: October 6, 1980.

/s/ A. Andrew Hauk

THE HONORABLE A. ANDREW HAUK
United States District Judge

APPENDIX X

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 80-4130 WMB (JRX)
(Assigned to AAH (KX))

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(LOCAL RULE 7; FRCP 52)

KENT KAISAKI, by his
GUARDIAN AD LITEM MICKEY KAISAKI,
RICHARD DANIEL DE ALBA, by his
GUARDIAN AD LITEM, ROSALIO DE ALBA,
PLAINTIFFS

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES;
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES;
THE HONORABLE JUDGE PAUL EGLY;
EDWARD HAMILTON; DR. FRANCINE RABINOVITZ;
HRS, INC.,
DEFENDANTS.

On September 18, 1980, plaintiffs Kent Kaisaki, by his Guardian Ad Litem Mickey Kaisaki, and Richard Daniel de Alba, by his Guardian Ad Litem, Roasalio de Alba ("plaintiffs"), filed a Complaint against defendants alleging violations of the Civil Rights Law (42 USC §§ 1983 and 1985(3)) and seeking injunctive relief as particularly

described herein. Concurrently with filing of their Complaint, plaintiffs filed an Application for Temporary Restraining Order seeking to restrain defendants from "implementing and applying a mandatory bussing plan as presently ordered by the Los Angeles Superior Court, to Richland Avenue Elementary School."

On September 18, 1980, in the above-entitled Court, before The Honorable A. Andrew Hauk, United States District Judge, the Application for Temporary Restraining Order came on for hearing. Sanford Levenberg appeared as attorney for plaintiffs. Nossaman, Krueger & Marsh, by Charles S. Vogel and Richard D. Fybel, appeared as attorneys for defendants Superior Court of the State of California for the County of Los Angeles, the Honorable Judge Paul Egly, Edward Hamilton, Dr. Francine Rabinovitz and HRS, Inc. McCutchen, Black, Verleger & Shea, by Peter W. James, David T. Peterson and Jerry F. Halverson, appeared as attorneys for defendant Board of Education of the City of Los Angeles. Fred Okrand appeared and was admitted by the Court as amicus curiae for defendants.

On September 18, 1980, the Court read and considered plaintiffs' Complaint, the Application for Restraining Order specifically including the Declaration of Sanford Levenberg and exhibits thereto and the Affidavit of Robert P. Shaffer. The Court also heard and considered oral argument of plaintiffs' and defendants' counsel made at the hearing.

In accordance with Rule 52 of the Federal Rules of Civil Procedure and Local Rule 7(a), the Court sets forth its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiffs are citizens and residents of the State of California, residing within this district and attending Richland Avenue Elementary School within the City and County of Los Angeles.

2. Defendant Los Angeles Board of Education is a department of the municipal government of the City of Los Angeles.

3. The Honorable Judge Paul Egly and the Superior Court of the State of California in and for the County of Los Angeles are, respectively, an employee of and a branch of the government of the State of California.

4. Defendants Dr. Francine Rabinovitz and Edward Hamilton are citizens and residents of the State of California residing within this district and are employees of co-defendant HRS, Inc. Defendants Rabinovitz, Hamilton and HRS, Inc. are the Superior Court's appointed monitors in connection with the busing plan at issue herein.

5. Plaintiffs in their complaint seek a temporary restraining order, a preliminary injunction and a permanent injunction enjoining defendants from implementing the mandatory busing plan ordered by Judge Egly of the Los Angeles Superior Court as it applies to Richland Avenue Elementary School ("Richland"). Richland is an elementary school located in Court Area 5 and was ordered by the Los Angeles Superior Court on August 25, 1980 to be a participant in a busing plan which involves a "cluster" of elementary schools consisting of Castle Heights Elementary School, Richland, Playa del Rey Elementary School and 54th Street Elementary School. Pursuant to this busing plan, the minority enrollment at 54th Street School will decrease from 100% to 68.4%, according to plaintiffs' Declaration.

6. Classes at Richland commenced on September 16, 1980. Thus, the hearing herein and plaintiffs' application for injunctive relief by temporary restraining order occurred on the third day of school at Richland, September 18, 1980.

7. On September 12, 1980, Mr. Justice Rehnquist issued an opinion in his capacity as Circuit Judge for the Ninth Circuit in *Board of Education of City of Los Angeles v. Superior Court of California, County of Los Angeles (Mary Ellen Crawford, real party in interest)*. (49 USLW 3163). Justice Rehnquist denied the request of the Board of Education of the Los Angeles Unified School District (a defendant herein) to "stay an order of the California Supreme Court, dated August 27, 1980, which left standing an order of [Judge Egly of] the Superior Court of the State of California for Los Angeles County requiring mandatory reassignment of between 80,000 and 100,000 first through ninth grade students attending approximately 165 elementary and junior high schools pending consideration by the United States Supreme Court of its petition for certiorari." (49 USLW 3163)

8. In Justice Rehnquist's order denying the stay, he reviewed the history of *Crawford v. Board of Education*, 17 Cal. 3d 286 (1976). Justice Rehnquist concluded that: ". . . a stay granted less than a week before the scheduled opening of school, when school officials and state courts are still trying to put in place the final pieces of a plan, would not be a proper exercise of my function as a Circuit Justice, even though were I voting on the merits of a petition for certiorari challenging the plan I would, as presently advised, feel differently. The application for a stay is accordingly denied." (49 USLW at 3164).

9. On September 16, 1980, the California Supreme Court in *Crawford, etc. et al. v. The Court of Appeal, Second Appellate District; Board of Education, City of Los*

Angeles et al., Real Parties in Interest decided, in pertinent part: "Under this court's decision in Crawford v. Board of Education (1976) 17 Cal. 3d 280, on remand of this case it is the trial court, rather than the defendant school board, that has the initial responsibility for supervising the formulation and implementation of a reasonably feasible desegregation plan. Under the circumstances, we find that the trial court's order of September 12, 1980 represents a valid exercise of the court's broad equitable discretion. Accordingly, the petitions seeking to stay the effect of that order pending appeal are denied."

10. There is no probability of success by plaintiffs on the merits in this case.

11. Plaintiffs will not suffer irreparable injury if they are not granted injunctive relief herein.

12. In balancing the equities and hardships, the balances tip very sharply in favor of defendants, and each of them. If the injunctive relief requested was granted, defendants would be put in a terrible and intolerable situation and irreparable and great harm would occur to the Los Angeles School District's school children, minority population, minority school children, the School Board and its staff at this late, intense time.

13. The public interest is best served and requires denial of the injunctive relief requested.

CONCLUSIONS OF LAW

A. The Court concludes in all respects as hereinabove set forth in its Findings of Fact.

B. This action is brought under, and the Court has jurisdiction of this action pursuant to, 28 USC § 1343(4) and 42 USC §§ 1983, 1985(3).

C. Plaintiffs' applications and prayer for injunctive relief by temporary restraining order, preliminary injunction and permanent injunction, and each of them, should be and is hereby denied in their entirety. *Crawford v. Board of Education,* 17 Cal. 3d 280 (1976); the recent decisions of Justice Rehnquist and the California Supreme Court, *supra; Sierra Club v. Hickel,* 433 F.2d 24, 33 (9th Cir. 1970), aff'd. 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Wm. Inglis & Sons Baking v. ITT Cont. Baking Co.,* 526 F.2d 86 (9th Cir. 1975); *King v. Saddleback Junior College District,* 425 F.2d 426, 427 (9th Cir. 1970), *cert. denied,* 404 U.S. 979 (1970); *County of Santa Barbara v. Hickel,* 426 F.2d 164, 168 (9th Cir. 1970); *Sierra Club v. Hathaway,* 579 F.2d 1162, 1167 (9th Cir. 1978); *Kass v. Arden-Mayfair, Inc.,* 431 F.Supp. 1037, 1041 (C.D. Cal. 1977).

D. Plaintiffs and defendants, and each of them, have stipulated and the Court concludes that the applications for temporary restraining order and preliminary injunction may be and are consolidated with this trial on the merits for a permanent injunction. Plaintiffs do not seek damages on this case.

E. Plaintiffs shall take nothing on their Complaint. Defendants Superior Court of the State of California for the County of Los Angeles; Board of Education of the City of Los Angeles; The Honorable Judge Paul Egly; Edward Hamilton; Dr. Francine Rabinovitz; and HRS. Inc. are entitled to judgment on the Complaint and to recover of the plaintiffs their costs of action herein.

Dated at Los Angeles, California, this 6th day of October, 1980.

/s/ A. Andrew Hauk

The Honorable A. Andrew Hauk
United States District Judge

No. 85-27(2)

Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1984

LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE CITY OF LOS ANGELES; and HARRY HANDLER, SUPERINTENDENT, In His Official Capacity,
Petitioners and Cross-Respondents,
vs.
LOS ANGELES NAACP, BEVERLY HILLS-HOLLYWOOD BRANCH NAACP, SAN PEDRO-WILMINGTON BRANCH NAACP, WATTS BRANCH NAACP, SAN FERNANDO VALLEY NAACP, and CARSON NAACP,
Respondents and Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals, Ninth Judicial Circuit, No. CA-81-5772

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

G. WILLIAM SHEA,
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CROSS-RESPONDENTS' ("THE DISTRICT") RESPONSE TO THE CROSS-PETITION OF LOS ANGELES NAACP, ET AL. ("NAACP")

I

THE QUESTION PRESENTED IN THE CROSS-PETITION ASSERTS A RESERVATION OF FEDERAL RIGHTS IN THE STATE COURT CRAWFORD PROCEEDINGS. THIS ASSERTION IS CONTRARY TO THE RECORD BELOW.

The sole question presented by the NAACP cross-petition for certiorari is

> "Whether a federal court, in a federal school desegregation case under 42 U.S.C. § 1983, should apply claim preclusion to a state court judgment, which was limited by express reservation of federal law issues, and, in which a subsequent change in state law renewed the opportunity to litigate federal issues, but which closed without being so litigated?"

In *Crawford I*[1] and *Crawford II*,[2] both courts expressly recognized that the *Crawford* plaintiffs had litigated in those state proceedings the same federal de jure segregation claims asserted again in this case. (See the District's petition at pp. 6, 7-8, 12, 13.) Moreover, after holding that the trial court's findings did not establish de jure conduct, the Court in *Crawford II* remanded the case to the state trial court for further proceedings. 113 Cal.App.3d at 656. During those

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[1] *Crawford v. Board of Education*, 17 Cal.3d 280 (1976)

[2] *Crawford v. Board of Education*, 113 Cal.App.3d 633 (1980)

further proceedings the *Crawford* plaintiffs sought to have the state trial court enjoin alleged de jure conduct by the District. 750 F.2d at 745. This Court should not consider a question presented that is based on a factual assertion which is contrary to both the record and the opinion below.

II

THE ISSUE OF MERGER SHOULD BE REJECTED BECAUSE THE MERGER ARGUMENT RESTS UPON THE SAME ERRONEOUS FACTUAL ASSERTION OF RESERVED RIGHTS. THIS ISSUE ALSO WAS NOT RAISED BELOW.

The cross-petition alleges that "(t)he entire analysis of merger and its applicability was ignored in the opinion below, because the opinion focuses solely and erroneously, on the bar effects of Crawford II." Cross-petition at p. 35. In so stating, the cross-petition raises an argument, based solely on California law, that was not presented to either the district court or the court of appeals. It is the general rule that a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1975). Moreover, the Supreme Court does not ordinarily decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1975). The cross-petition cannot properly criticize the court of appeals for failing to discuss an argument which the NAACP did not raise. Nor should this Court grant a cross-petition for certiorari to consider that state-law argument for the first time.

The cross-petition asserts that the *Crawford* plaintiffs' federal rights merged into a res judicata judgment, which, however, did not include pre-1963 federal rights

because those rights were reserved. (Cross-petition at pp. 34-35.) It further asserts that the reserved federal rights and the merged federal rights were never raised after that 1969 judgment.

The alleged reservation of pre-1963 rights is based upon a trial stipulation before trial judge Gitelson in the *Crawford* case. (Appendix to cross-petition at pp. 35b-37b, 49b, 53b, 54b & 55b.) However, as that judge observed (*id.* at p. 46b), that stipulation reserved nothing — it was only a temporary trial guide on the order of proof. The stipulation was later vacated. (*Id.* at pp. 148b & 158b.) Moreover, as the District's petition for writ of certiorari demonstrates (Appendix at pp. 214a-215a) and as the court below held, the *Crawford* plaintiffs did litigate de jure issues as late as 1980 and 1981. 750 F.2d at 745. Thus the merger argument, raised here for the first time, rests on factual assertions that are flatly contradicted by the record.

CONCLUSION

For these reasons, the Court should deny the cross-petition for writ of certiorari.

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EDITOR'S NOTE

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Supreme Court, U.S.
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CLERK

(3)

No. 85-27

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE CITY OF LOS ANGELES; And HARRY HANDLER, SUPERINTENDENT, In His Official Capacity

Petitionersand Cross-Respondents,

vs.

LOS ANGELES BRANCH NAACP, BEVERLY HILLS-HOLLYWOOD NAACP; SAN PEDRO-WILMINGTON NAACP; WATTS NAACP;SAN FERNANDO VALLEY NAACP; And CARSON NAACP,

Respondents and Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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RESPONDENTS NAACP'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS NAACP'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR OPPOSING CERTIORARI

I

Preliminary Statement

Like the partially dissenting opinion of four members of the court below, expressed through Judge Sneed, the Petition For Certiorari erroneously seeks the extension of the preclusive effects of res judicata to include any alleged segregative acts occurring prior to entry

of the close of remedial proceedings by the Los Angeles Superior Court in **Crawford**, i.e., September 10, 1981. 1/

1/ Judge Sneed's partial dissent is based, prima facie, on his consistent belief that California Proposition I "explicitly put all alleged segregative acts at issue in the state court proceedings" (750 F.2d at p. 746); that the Los Angeles Board's application was a "supplemental pleading that put at issue the question of whether any acts of de jure segregation occurred up until the final disposition of that motion" and was "an invitation for the plaintiffs to come forward with whatever evidence existed of de jure segregation in the decade since the original trial" (750 F.2d at p. 747); and, that the **Crawford** plaintiffs, thereafter, unilaterally declined the invitation, thereby forever waiving any right to litigate any federal issues, including those new issues, in any other forum. (750 F.2d at p. 748)

Claiming support under California claim preclusion law, Judge Sneed opines that "because of both the unique character of school desegregation cases in general and the special circumstances of this case, the date of judgment, for the purpose of applying the **Eichman** rule [preclusion to the time of judgment, rather than time of complaint], must be the date of the state court's final order in 1981." (750 F.2d at p. 748)

Differing from the minority opinion below, however, the Petitioners assert not solely that the **Crawford** plaintiffs had the **opportunity** to litigate post-1969 de jure liability claims, but that they **actually litigated**, repeatedly, such claims, and once having done so, they were required by state preclusion rules to be barred from litigating **those** two claims or **any other** claims occurring prior to September 10, 1981. (Brief, p. 7) 2/

In support of this all or nothing rule, petitioners cite **Allen v. McCurry**,

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2/ The only such claims specifically indicated, by way of example, are: 1) "the District's construction of bungalows on overcrowded minority schools. . . .[conduct said to have occurred in 1976, 1977 and 1978]" (Brief, p.7) and, 2) "the District's decision to dismantle the court-ordered desegregation plan. . . ." (Brief, p. 8)

449 U.S. 90, 104-105, 101 S.Ct. 411, 420-421, 66 L.Ed.2d 308 (1980) and **Boccardo v. Safeway Stores, Inc.**, 134 Cal. App. 1037, 184 Cal. Rptr. 903 (1982) (Brief, p. 14.) Petitioners therein suggest that the Supreme Court has adopted an applicable federal preclusion rule in **Allen v. McCurry**, supra, which was not followed by the court below when it extended claim preclusion only to 1969. The petitioners' argument, then, is that the court below erred in not extending the preclusion further, because it allegedly created and relied upon a **new** "Remedy Exception", not based in the California preclusion law. 3/ (Brief, p. 15.)

3/ Petitioners described the California "Remedy Exception" in terms that "California claim preclusion 'does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated.'" (Brief, p. 15) The reference is to part of the en banc opinion below at

As an alternative argument of the Certiorari Petition, petitioners assert that this case presents an appropriate occasion for this Court "to adopt the federal claim preclusion standards urged by the concurring opinion in **Migra.**" (Brief, p. 18.) The rule urged is one that would interpret 28 U.S.C. §1738 to permit federal preclusion on federal standards, even for circumstances in which a state court would not order such preclusion, thus closing the door only to the federal court, leaving the state

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3/ (cont.) page 739. (Petition, Appendix p. 13a). In support of this rule, The circuit court cited consistent and long-standing California authority, **Kettelle v. Kettelle**, 110 Cal. App. 310, 312 (1930), **Lord v. Garland**, 27 Cal.2d 840, 849 (1946); **Brown v. Brown**, 170 Cal. 1, 4 (1915); and **Metropolis Trust & Savings Bank v. Barnet**, 165 Cal. 449 (1913).

court as the only forum available. See, **Migra v. Warren City School District Board of Education**, __ U.S. __, 104 S.Ct. 892, 900 (1984) (concurring opinion of Justice White). Again, petitioners seek application of such a rule, for this case only, upon the consistently and baldly stated, uncritical assertion that federal law claims were actually litigated in the state court.

II

The Refusal of the Court Below To Extend Claim Preclusion Beyond 1969, Based On Long-standing California Doctrine and the Plain Facts That Federal Liability Issues Were Not Litigated Is Neither New Nor Erroneous In Application

Petitioners contend that the court below erred by creating and applying a new "Remedy Exception" to 28 U.S.C. §1738, because that court, after applying preclusion to all matters occur-

ring prior to 1969, which were deemed to have been raised in state court or which could have been raised, refused to extend that same preclusive effect to matters arising after 1969, which were deemed not raised by the pleadings or judgment in **Crawford.** In so doing, the circuit court explicitly refused to extend such primacy to the **Crawford** remand proceedings because the federal claims were not actually litigated and because those proceedings were concerned exclusively with questions of **remedy** under the state law and not with questions of liability and remedy under the federal constitution. (See, 750 F.2d at p. 740)

The petitioners maintain, in effect, that uncited passages in **Allen v. McCurry**, supra, and **Kremer v. Chemical Construction Corp.**, __ U.S. __, 102 S.Ct.

1883 (1982), in combination with dictum from **Boccardo v. Safeway**, supra, compel a rule that once the words "de jure segregation" were uttered by the **Crawford** plaintiffs, even in one reference, they were required to litigate all and any de jure segregation claims up to that point. 4/

Petitioners characterized the Circuit Court's stance as the new "Remedy Exception." There is nothing new about this rule of California preclusion law, as cited by the Circuit Court. The line

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4/ This Court in **Allen v. McCurry** specifically declined to intimate any view on the correctness of rejection of claim preclusion in federal court on federal issues which could have been raised in state court but were not. **Id.**, p. 97, fn. 10.

of cases supporting that view are consistent and long-standing. 5/ These authorities don't deal, merely, with a remedy exception, but state a basic limitation of the California claim preclusion law that restricts the reach of state judgments to the matters embraced. This is a California policy of long standing which restricts the broad ambit of preclusion of matters which could have, but were not litigated in the previous litigation. The old case authority cited is further supplemented by explicit statutory authority in California Code of

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5/ See footnote 3, infra, for citation of California cases relied upon by the court below.

Civil Procedure §1911, which reads:

> That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

As our Cross-Petition clearly indicates, because of its perceptual focus on the wrong final judgment in the state case, the court below seriously erred in its application of state claim preclusion rules, ignoring important limitations on preclusion, such as those relating to matters expressly reserved and not reached in the former litigation.

III

This Court Has Never Created Distinct Federal Preclusion Rules Which Override §1738's Requirements, Despite Several Recent Opportunities To Do So.

Allen v. McCurry, supra, is overread to have created a distinct federal rule of claim preclusion. This Court's holding was that there would be no "universal right to litigate a federal claim in a federal district court," for 42 U.S.C. §1983 cases, once the matter was "already decided" with finality in the state court. Id., pp. 104-105. In so holding, it appears that the Court was not intending to make any new federal rule of waiver, estoppel or election, but was supporting principles of comity for those state forums that provided essentially fair opportunities for the litigation of federal law claims, thus offering some form of protection to federal

rights. Id., at pp. 101, 104, 105.

Similarly, petitioners rely on no more than dictum in thier reference to **Boccardo v. Safeway**, supra. The issue in that case was whether a state claim was res judicata after dismissal resulting from a former federal action. The case discussion concerns itself primarily with construction of the primary rights doctrine and whether or how the Restatement rule re prior dismissal should be applied. That issue turned on the res judicata effect of federal dismissal of a pendent state claim.

Consideration of a separate state preclusion rule, requiring all or nothing presentation, was entertained by the court in dictum [" a better course might be . . . ."] This rule was not used in the decision and the Restatement rule was

applied to the case. The dictum in **Boccardo** has no force and effect on this case under 28 U.S.C. §1738.

Further, in our cross-petition, we pointed out that this Court has twice refused to adopt a distinct federal preclusion standard to override application of §1738 consideration. See, **Migra**, supra, and **Haring v. Prosise**, 462 U.S. 306, 103 S.Ct. 2368

IV

This Petition For Certiorari Conflicts With This Court's Policies In Ways Qualitatively Distinct From the Cross-Petition and Should Be Denied

The petition for certiorari is mere factual disagreement with the Circuit Court's view of the limited scope of the proceedings in Crawford, after remand from the decision of the California Supreme Court in **Crawford v. Board of**

Education, 17 Cal.3d 280 (1976) (**Crawford I**).

Ordinarily, this Court's policy is not to grant review where the petition, standing alone, is merely a challenge to state law determinations by the Court of Appeals. See, **Haring v. Prosise**, 2575, n. 8 (1983). We acknowledged this in our Cross-petition for Certiorari, at page 48, note 27, because we also challenged the Circuit Court's application of state preclusion law, based on its unreasonable, critically flawed factual and legal premises, drawn from the record of the **Crawford** litigation in the state court. The petitioners' challenge, here, differs, qualitatively, from our challenge, fundamentally, in that they accept the court's legal premises, but only dispute whether or not the court below has been consistent in its factual

findings that federal claims were not actually litigated during the state appeal and remedy proceedings from 1970 to 1981.

We posit our challenge on the positive, fundamental legal and factual ground that the only judgment in **Crawford**, to which preclusion could attach, is the 1970 Judgment and Writ of Mandate, as affirmed, which reserved major issues of federal liability and excluded any de jure liability findings whatsoever, especially those prior to 1963, as unecessary to the state court judgment.

If the legal effect of the **Crawford I** judgment for liability purposes, as opposed to its continued viability for remedial purposes, was not affected by the plebiscite, the dramatic

change in state law, and its subsequent implementation in **Crawford II**, as we maintain and has this Court has noted in **Crawford III**, the Circuit Court's reliance on such preclusive effect from **Crawford II** is unreasonable and clearly erroneous, requiring review only by this Court to vindicate the personal and present rights of the children. If the Circuit Court erred in limiting the preclusive reach of the **Crawford II** judgment, using the so-called "Remedy Exception," that is merely an incorrect construction of California law. Such an error imposes no prejudice to the school authorities even remotely similar to the grave and fundamental consequences of forfeiture of civil rights. Any such error could be subsequently corrected by this Court or the lower courts upon review of the fully developed record.

CONCLUSION

Based on the foregoing, the Petition For Certiorari should be denied on the issues submitted. Any review of the decision below should be under the issues presented in the Cross-Petition.

Respectfully submitted,

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